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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1998

LEVITON MANUFACTURING CO., INC.,
PETITIONER,

v.

RHODE ISLAND INSURERS' INSOLVENCY FUND,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A 1970 Rhode Island statute created an insurers' insolvency fund which received moneys from assessments upon insurers and provided that the fund would assume the obligations of the coverage provided by insurers upon their insolvency. The 1970 statute also provided that the fund would have no claim against insureds for payments made on their behalf.

A 1988 Rhode Island statute repealed the 1970 statute, creating a new version of the insolvency fund which now gives the fund the right to recover the amount of any "covered claim" paid on behalf of "[a]ny insured whose net worth on December 31 of the year next preceding the date the insurer became an insolvent insurer exceeded fifty million dollars ($50,000,000)...." R.I. Gen. Laws § 27-34-11(2)(a)(1988).

The question presented is whether the 1988 statute, as it applies to claims arising under insurance contracts that were executed when the 1970 act was in effect and provided coverage for claims arising exclusively within that period, violates the Due Process Clause and Contract Clause of the United States Constitution.

RULE 29.6 STATEMENT

Petitioner Leviton Manufacturing Co. has no subsidiaries other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Leviton Manufacturing Co., Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Rhode Island in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Rhode Island (App. p. A-12) is reported as *Rhode Island Insurers' Insolvency Fund* v. *Leviton Mfg. Co., Inc.*, 716 A.2d 730 (R.I. 1998). The opinion of the Superior Court of Rhode Island (App. p. A-1) is reported as *Rhode Island Insurers' Insolvency Fund* v. *Leviton Mfg. Co., Inc.*, No. 95-2505, 1996 WL 936930 (R.I. Super. May 16, 1996).

JURISDICTION

The judgment of the Supreme Court of the State of Rhode Island was entered on July 24, 1998. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution, Article I, Section 10, provides: "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . ." App. p. A-27.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." App. p. A-27.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." App. p. A-27.

1970 R.I. Pub. Laws, ch. 166, § 1 *et seq.*, codified at R.I. Gen. Laws § 27-34-1 *et seq.* (repealed 1988): App. p. A-29.

1988 R.I. Pub. Laws, ch. 407, § 2 *et seq.*, codified at R.I. Gen. Laws § 27-34-1 *et seq.* App. p. A-42.

STATEMENT

A. Statutory and Factual Background

This action filed by the Rhode Island Insurers' Insolvency Fund (the "Fund") seeks the recovery of several million dollars from defendants Leviton Manufacturing Co., Inc. ("Leviton") and American Insulated Wire Corporation[1]

[1] Leviton is a Delaware corporation with its principal place of business in New York, New York, that operates a manufacturing facility in Warwick, Rhode Island. It has manufacturing facilities in twelve other states. AIWC is Leviton's wholly-owned subsidiary whose net worth is less than $50 million. This petition is filed only on behalf of Leviton. The Complaint against AIWC has been dismissed.

("AIWC") for workers compensation claims for which defendants had been covered by three sequential yearly insurance policies issued by American Mutual Insurance Company ("American Mutual") from April 1, 1983 to April 1, 1986. (One policy is included in the Appendix at p. A-56.) When Leviton contracted with American Mutual for workers' compensation insurance, the Rhode Island Insurers' Insolvency Fund Act (the "1970 Act") specifically provided that the Fund was prohibited from seeking reimbursement from insureds for any claims paid on the insureds' behalf.[2] R.I. Gen. Laws § 27-34-8(f) (repealed 1988). App. pp. A-29, A-36.

In July 1988, the Rhode Island General Assembly repealed the 1970 Act and enacted a new version, 1988 R.I. Pub. Laws, ch. 407, § 2 *et seq.* (codified at R.I. Gen. Laws § 27-34-1 *et seq.*) (the "1988 Act"). App. p. A-42. One of the changes made in the 1988 Act was that it gave the Fund the right to recover the amount of any "covered claim" paid on behalf of "[a]ny insured whose net worth on December 31 of the year next preceding the date the insurer became an insolvent insurer exceeded fifty million dollars ($50,000,000) and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter. . . ." R.I. Gen. Laws § 27-34-11(2)(a)(1988). App. p. A-51. The 1988 Act continues to preclude the Fund from seeking reimbursement

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[2] The Rhode Island Insurers' Insolvency Fund Act was originally enacted in 1970. 1970 R.I. Pub. Laws, ch. 166, § 1 *et seq.* (codified as R.I. Gen. Laws § 27-34-1 *et seq.*) (repealed 1988). (This version of the Act is referred to as the "1970 Act") The 1970 Act created the Rhode Island Insurance Insolvency Fund (the "Fund") in order to provide for the payment of claims covered under certain policies of insurance issued by insolvent insurers. R.I. Gen. Laws § 27-34-2 (repealed 1988). The Fund receives moneys from assessments on insurers based upon workers' compensation premiums. The Act provided that, upon the determination of an insurer's insolvency, the insurance coverage provided by the insurer "become[s] the obligation of the [F]und. . ." with the Fund having "all the rights, duties and obligations of the insolvent insurer. . . ." *Id.* at § 27-34-6. *The 1970 Act further provided that, upon the insolvency of an insurer, "[t]he [F]und shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out." Id.* at § 27-34-8(f) (emphasis added). App. p. A-36.

for "covered claims" from any insured with a net worth less than $50 million on the relevant date. *Id.* at § 27-34-11(1). Leviton has a net worth in excess of $50 million.

On March 9, 1989, approximately three years after the expiration of the last of the American Mutual policies issued to Leviton, American Mutual was determined to be insolvent and ordered into liquidation by the Supreme Judicial Court of the Commonwealth of Massachusetts. Following American Mutual's insolvency, the Fund, as it was obligated to do by the 1988 Act, paid "covered claims" arising under the three policies issued by American Mutual to many injured workers. Thereafter, the Fund sought reimbursement from Leviton, contending that these "covered claims" include claims made under the workers' compensation policies issued by American Mutual to Leviton between April 1, 1983 and April 1, 1986.

B. The Proceedings Below

In May 1993, the Fund filed suit, alleging that Leviton is liable to the Fund for payments it made pursuant to the 1988 Act, even though any "covered claims" it may have paid on behalf of Leviton were incurred *prior* to 1988 when the 1970 Act precluded any recovery from the insured for such claims. On May 13, 1993, Leviton answered the Complaint and raised a number of affirmative defenses, including defenses indicating that the 1988 Act, as applied to Leviton under the circumstances set forth above, violates the United States Constitution.[3] Specifically, Leviton invoked the Due Process Clause of the U.S. Constitution, arguing that the 1988 Act, as applied by the Fund, violates the Due Process Clause by, *inter alia*, retroactively imposing a reimbursement obligation upon Leviton for claims which arose prior to the Act, whereas

[3] Leviton's defenses included a number of defenses that are not argued here, but were raised at various points below, including that the 1988 Act violates the Takings Clause of the Unites States Constitution, the Equal Protection Clause of the United States Constitution, and other parallel defenses invoking the Rhode Island Constitution.

at the time the claims arose, the statute then in effect expressly precluded reimbursement of the Fund by Leviton. Leviton's defense also posited that the 1988 Act, on its face, violates the Due Process Clause of the Fifth and Fourteenth Amendments by, *inter alia*, authorizing the Fund to retroactively impose a reimbursement obligation upon an insured.

Leviton also invoked the Contract Clause, Article I, Section 10, of the U.S. Constitution, arguing that as applied by the Fund, and on its face, the 1988 Act violates the Contract Clause because, *inter alia*, it impairs the obligation of the contract between Leviton and American Mutual by changing the legal obligations under the contract and depriving Leviton of the ability to enforce its rights under the law existing at the time of the contract.

On October 5, 1995, the Fund filed a Motion for Partial Summary Judgment and Motion to Strike the Defendants' Constitutional Defenses. Leviton filed an Objection to the motions. The motions were fully briefed and argued before the trial court.

The trial court held R.I. Gen. Laws § 27-34-11(2)(a) to be constitutional and granted Plaintiff's Motion for Partial Summary Judgment, holding that R.I. Gen. Laws § 27-34-11(2)(a) does not violate the Due Process Clause, or the Contract Clause of the United States Constitution.[4] 1996 WL 936930 at *4-5. App. p. A-1. With respect to the Due Process Clause, the court found that the statute did not operate retroactively, stating that this "eliminates the need to examine the statute's constitutionality." *Id.* at *4. The court went on in dicta to state that "[e]ven if the statute could be characterized as having some retroactive aspect, however, it still meets the minimal test of constitutionality under the Due Process Clause. As addressed earlier, a rational relationship exists between the statute and a legitimate public purpose." *Id.*

With respect to the Contract Clause, the court examined

[4] The Court rejected other constitutional defenses raised by Leviton below, but not raised here.

the "threshold inquiry under the Contract Clause," which is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." 1996 WL 936930 at *5, citing *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, (1983). The court also stated the standard that "[i]f substantial impairment exists, the court must determine whether the state has a significant and legitimate public purpose behind the regulation." *Id.*, citing *Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. at 704. Upon review, the court found that "Leviton has failed to hurdle the threshold inquiry on this issue. The statute does not impair the contract between Leviton and American Mutual." *Id.* Again adding dicta, the court stated, "[e]ven if substantial impairment did exist, however, it is clear the state has a significant and legitimate public purpose behind the regulation: preservation of the fund's limited resources." *Id.*, citing *Energy Reserves Group*, 459 U.S. at 411-12, 103 S.Ct. at 704-05.

The Supreme Court of the State of Rhode Island ("Rhode Island Supreme Court") affirmed the trial court's decision. App. p. A-12. The court reviewed the issues raised by Leviton, including:

> that [R.I. Gen. Laws § 27-34-11(b)(1)[5]] violates the due-process clause of the United States and the Rhode Island Constitutions because the statute is applied retroactively to insurance policies that were purchased, and even expired, before the effective date of the recoupment provision. Finally, defendants allege that subsection 11(b)(1) violates the contract clause of the United States and Rhode Island Constitutions because it impairs their contractual relationship with American Mutual without a legitimate governmental purpose for this impairment.

[5] The statutory reference in the General Laws differs from the act passed in 1988, where the reference is § 27-34-11(2)(a).

716 A.2d at 733. The Rhode Island Supreme Court concluded as to the due process issue that "it is our position that this statute does not operate retroactively and it is therefore unnecessary for us to analyze § 27-34-11(b)(1) further with regard to defendants' due-process rights." *Id.* at 736. The court also rejected Leviton's various arguments that the statute violates the Contract Clause. *Id.* at 736-37.

In sum, the federal questions raised herein were properly raised and passed upon below, and this Court has jurisdiction to review the judgment of the Rhode Island Supreme Court by a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The 1988 Act violates the Due Process Clause of the United States Constitution because the Act operates retroactively and is void because it impairs contractual obligations of the Fund and vested property rights of Leviton. Further, there is no rational legislative purpose to justify the Act. As such, the decision below upholding the 1988 Act disrupts settled principles of constitutional interpretation as enunciated by this Court. *See, e.g.*, *Eastern Enterprises* v. *Apfel*, __ U.S. __, 118 S.Ct. 2131 (1998).

The 1988 Act violates the Contract Clause of the United States Constitution because it substantially impairs the contractual relationship between Leviton and its insurer, and there is no legitimate public purpose behind the Act that justifies the impairment. As such, the decision below upholding the 1988 Act disrupts settled principles of constitutional interpretation as enunciated by this Court. *See, e.g.*, *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1978); *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934).

I. The Rhode Island Supreme Court Erred In Holding That the 1988 Act Is Not Retroactive And The 1988 Act Does Not Violate The Due Process Clause Of The United States Constitution.

A. The Applicability Of Principles Enunciated In *Eastern Enterprises* v. *Apfel*, 118 S.Ct. 2131 (1998).

In 1998, approximately one month prior to the issuance of the Rhode Island Supreme Court's decision in this case, this Court decided *Apfel*, *supra*, 118 S.Ct. 2131. The Rhode Island Supreme Court did not consider the *Apfel* decision which elucidates a number of important legal principles and applies them to facts similar to those posed in this case.

The *Apfel* petitioner, Eastern Enterprises ("Eastern"), had paid into a fund that was designed to cover benefits and medical claims incurred by its employees. Similarly, Leviton paid for workers' compensation coverage from American Mutual, and through the premiums paid to American Mutual paid into the Fund, which was to assume American Mutual's obligations in the event of insolvency. Thus, both companies paid premiums in exchange for relieving themselves of the obligation to pay claims brought by their employees. Both companies ultimately ended their respective insurance arrangements, but having paid premiums, they reasonably expected that they would not be subject to any future liability for the covered claims. Finally, both companies were subject to statutes that were subsequently passed and which imposed liability (retroactively) for future payments to the employees for claims that they believed had previously been covered. In Eastern's case, this was the Coal Act of 1992, which required Eastern to pay premiums to cover future benefits to its employees of decades past. Here, the 1988 Act allows the Fund to extract similar payments from Leviton. Given the similarities, it is particularly appropriate to apply the reasoning of *Apfel* to this case.

B. The 1988 Act As Applied To Leviton Operates Retroactively So As To Violate Due Process.

In *Apfel*, this Court found that the Coal Act was unconstitutional as applied to Eastern, with a plurality of four justices holding that an unconstitutional taking had occurred (while avoiding the due process question). Justice Kennedy, concurring, held that a taking had not occurred but that the Coal Act was unconstitutional nonetheless as it violated the Due Process Clause.[6] Both opinions used strong language in expressing the Constitution's disfavor of retroactive laws. As stated by the plurality opinion:

> Retroactivity is generally disfavored in the law, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 469-470 (1988), in accordance with "fundamental notions of justice" that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 1586-1587 (1990) (Scalia, J., concurring).
>
> * * *
>
> "Retroactive legislation," we have explained, "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112 (1992).

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[6]The dissenting justices also eschewed a Takings Clause analysis in favor of a due process analysis, stating that "[t]he question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause, a Fifth Amendment neighbor [of the Takings Clause]. 118 S.Ct. at 2163. However, disagreeing with the facts as presented by the majority, the dissenters found that the Coal Act was constitutional.

118 S.Ct. at 2151 (O'Connor, J.). The rationale for this principle is further elucidated in Justice Kennedy's concurrence, which specifically states why due process protects against retroactive legislation:[7]

> If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

118 S.Ct. at 2159. In other words, legislation that sufficiently disrupts past transactions (i.e., contracts) or the "reasonable certainty and security" which vests as property, invokes the protection of due process. *See also Gorham* v. *Robinson*, 57 R.I. 1, 42, 186 A. 832, 852 (1936) (a retroactive statute is void if it impairs either contractual obligations or vested property rights). Justice Kennedy held that the Coal Act's destruction of Eastern's expectations under its previous agreement with the UMWA, and its security that it would not have to pay future claims, was a violation of due process. *Apfel*, 118 S.Ct. at 2159-60.

In so holding, Justice Kennedy joined the plurality in finding that "the Coal Act bears no legitimate relation to the interest which the government asserts in support of the

[7] In addition to his own analysis, Justice Kennedy notes that "it is no accident that the primary retroactivity precedents upon which today's plurality opinion relies in its taking analysis were grounded in due process." 118 S.Ct. at 2158.

statute." *Id.* (referring to the plurality opinion). The plurality relied upon this Court's decision in *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 113 S.Ct. 2264 (1993), stating that "an employer's statutory liability for multiemployer plan benefits should reflect some 'proportionality to its experience with the plan.'" 118 S.Ct. at 2149 (quoting *Concrete Pipe, supra* at 645, 113 S.Ct. at 2291 (internal quotation marks omitted)), and concluding:

> Although Eastern at one time employed the [fund] beneficiaries that it has been assigned under the Coal Act, the correlation between Eastern and its liability to the [fund] is tenuous, and the amount assessed against Eastern resembles a calculation "made in a vacuum."

118 S.Ct. at 2150 (quoting *Connolly* v. *Pension Ben. Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 1026 (1986)). Likewise, the 1988 Act does not base its recoupment provision upon any proportionality to the premiums paid, but rather ties the obligation arbitrarily to the net worth of the company. Indeed, Leviton is one of the few companies in Rhode Island that has been subject to the 1988 Act's recoupment provision and can easily be characterized as one of a group "targeted by retroactive laws." 118 S.Ct. at 2159 (Kennedy, J., concurring).

In sum, the 1988 Act suffers from the same fatal deficiencies as the Coal Act: it unjustly applies retroactively to deprive businesses of their "reasonable certainty and security which are the very objects of property ownership" without due process of law. *Id.*

C. The Rhode Island Supreme Court Erred In Holding That The 1988 Act Is Not Retroactive.

1. The Rhode Island Supreme Court misapplied the case law it relied upon.

The Rhode Island Supreme Court avoided even analyzing the due process challenge to the 1988 Act by holding that it was not a retroactive statute. 1998 WL 423444 at *5. Unfortunately, in so doing the court misapplied the law and wrongly denied Leviton the benefit of its viable due process challenge.

The court wrongly applied the trigger theory expressed in *McAndrews* v. *Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13 (1st Cir. 1993). The *McAndrews* court, in holding that a law was not retroactive, determined that *all* of the facts which could trigger the allegedly retroactive application of the legislation occurred after the law's effective date. Here, it is clear that not all of the circumstances affecting Leviton's rights occurred after the effective date of the 1988 Act. The workers' compensation costs for which the Fund seeks reimbursement were accrued from 1983 to 1986, well *before* the effective date of the 1988 Act.

The court's reliance upon *Liberty Mutual Ins. Co.* v. *Rhode Island Insurers' Insolvency Fund*, 675 A.2d 417, 418 (R.I. 1996) (mem.) is equally misplaced, and in fact demonstrates how *McAndrews* was misapplied. In Liberty Mutual, the trial justice had ruled "that [the 1988 Act] ***would not apply retroactively*** to Adjeleian's claim which arose in 1986." 675 A.2d at 418 (emphasis added). The Rhode Island Supreme Court *overturned* this decision, imposing a retroactive application of the statute such that it *would* apply to the claim which arose in 1986. Thus, *Liberty Mutual* demonstrates that the 1988 Act is retroactive, not the other way around. Despite its ruling of retroactivity, however, the *Liberty Mutual* court does not address the consitutionality issues associated with that ruling (perhaps not having been raised). Thus, when the case below

arose, the Rhode Island Supreme Court was in a position to reflect upon the consitutional ramifications of its previous decision, yet it decided instead to deny the retroactivity of its previous ruling.

2. *The Rhode Island Supreme Court has issued an opinion conflicting with the decision of another state's highest court.*

In first applying 1988 Act retroactively in *Liberty Mutual*, and then denying that it has done so in the decision below, the Rhode Island Supreme Court has issued rulings in conflict with the decision of Oklahoma's court of last resort. The Oklahoma Supreme Court addressed an issue similar to the one in the present case in *State of Oklahoma ex rel. John P. Crawford, et al.* v. *The Guardian Life Insurance Co.*, 954 P.2d 1235 (Okla. 1998). In that case, Guardian Life Insurance Company ("Guardian") and Life Insurance Company of Pennsylvania entered into a reinsurance agreement. *Id.* at 1237. In 1987, American Standard Life Insurance Company ("American") acquired Life Insurance Company of Pennsylvania's rights and obligations. *Id.* At that time, the Oklahoma statute mandated that credits and debts between a failed insurance company and its reinsurer would be offset so that only a balance was owed. In 1988, the statute was amended depriving a reinsurer of the right to offset debts against the amounts owed to it. *Id.* After American became insolvent, the receiver for American sued Guardian in 1992 seeking a declaratory judgment that Guardian had no right to offset claims against premiums under its reinsurance agreement with American. *Id.* The trial court held that the 1988 statute retroactively applied to Guardian, and therefore, Guardian was not entitled to the offset provision of the pre-amendment statute. *Id.*

The Oklahoma Supreme Court reversed the trial court and held that the 1988 statute could *not* be applied retroactively so as to deprive Guardian of its contractual right of offset. *Id.* at 1238-39. The court noted that there was "no indication

in the statutory language that the Legislature intended for the statute to apply retroactively." *Id.* at 1238. The court went on to state: "Indeed, to have attempted to have the statute destroy vested rights such as Guardian's would have raised serious constitutional issues." *Id.* (citing *United Petroleum Co. v. Oklahoma Water Resources Bd.*, 898 P.2d 1275 (Okla. 1995)). In fact, the court noted in a footnote that although it did not need to reach the issue of the constitutionality of applying the statute retroactively, "retroactive application of the statute would likely have been unconstitutional. . . ." *Id.* at n.2.

The Oklahoma court rejected the receiver's argument that the statute was not applied retroactively because it could not have been applied until after American was placed in receivership. *Id.* The court stated that the receiver's argument failed because:

> First, it ignores that the effect of applying the statute would have been to rewrite Guardian's contract. Second, if the statute did not have retroactive application because it did not come into play until American Standard Life's insolvency, it could never really apply retroactively. This argument, once again, ignores the fact that Guardian's rights to setoff were based on a contract made long before the Legislature passed [the 1988 amendment].

Id.

The analysis of the Oklahoma Supreme Court as applied to the statute at issue in this case, the 1988 Act, demonstrates not only that the 1988 Act is retroactive as interpreted by the Rhode Island Supreme Court in *Liberty Mutual*, but that such an interpretation is wrong. Here, Leviton's contractual right to have its workers' compensation claims covered by an insurer will be destroyed by the retrospective application of the recoupment provision of the 1988 Act. First, there is no indication the Rhode Island legislature intended the recoupment provision to apply retrospectively. Second, Leviton's

right to payment by American Mutual and its successors of the workers' compensation claims arising from 1983 to 1986 were fixed long before the recoupment provision became effective. Therefore, retroactive application of the 1988 Act would destroy Leviton's vested rights which were based on a contract with American Mutual entered into long before the Rhode Island legislature passed the 1988 Act.

The Rhode Island Supreme Court's decision below ignores the fact that the key events triggering operation of the 1988 Act are the pre-enactment purchase of an insurance policy and the event of a claim arising during the policy's occurrence period. This causes the statute to act retroactively. It is the same as in *Apfel*, where Eastern had paid premiums in the past for past employees' benefits. The Rhode Island Supreme Court would have this Court declare that the Coal Act is not retroactive because its application is triggered by the present and future benefit payments due to retired employees. This, of course, does not comport with *Apfel*, and thus the Rhode Island Supreme Court decision should be reversed.

II. The Rhode Island Supreme Court Erred In Holding That The 1988 Act Does Not Violate The Contract Clause Of The United States Constitution.

The recoupment provision of the 1988 Act violates the Contract Clause of the United States Constitution. U.S. Const., art. I, § 10, cl. 1.

Under Article I, § 10 of the United States Constitution, "[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts." The Contract Clause of the United States Constitution limits the power of the state to regulate private contracts. *U.S. Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 17, 97 S.Ct. 1505, 1515 (1977). This Supreme Court has held that contracts "between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened." *Lynch* v. *United States*, 292 U.S. 571,

580, 54 S.Ct. 840, 844 (1934) (footnote omitted).

The determination of whether legislation unconstitutionally impairs the obligation of contracts is made pursuant to a three-prong test: First, has the state law, in fact, operated as a substantial impairment of a contractual relationship? Second, if the law has operated as a substantial impairment, has the State shown a significant and legitimate public purpose for the law, such as "the remedying of a broad and general social or economic problem"? Third, is the substantial impairment of the contractual relationship "appropriate" given the stated public purpose justifying the law? *Energy Reserves Group*, 459 U.S. at 411-12, 103 S.Ct. at 704-05. The recoupment provision of the 1988 Act fails each prong of the test and therefore is unconstitutional under the Contract Clause.

A. The Recoupment Provision Substantially Impairs Leviton's Contracts with American Mutual.

The contracts at issue in this case are the three insurance policies issued to Leviton by American Mutual insuring it for purposes of workers' compensation from April 1, 1983 through April 1, 1986. These contracts obligated American Mutual to pay for medical treatment and time lost from employment in the event an employee of Leviton was injured arising out of and in the course of that employee's employment. The contracts specifically provided that: "[American Mutual] will pay promptly when due the benefits required of you by the workers' compensation law." App. p. A-93.

In addition to paying for the risk protections afforded by American Mutual, Leviton was well aware that its premium was financing the operating costs of American Mutual, which made payments to the Fund pursuant to the 1970 Act. The

provisions of the 1970 Act set forth the obligations of the insurer, the insured and the Fund in the event of insolvency, and were instrumental to the parties agreeing to be bound by their obligations under the insurance contracts and the reasonableness of the premium. Based upon the provisions of the 1970 Act, the parties reasonably expected that the Fund would be a secondary insurer in the event of American Mutual's insolvency. That expectation was based upon the language contained in the Act stating that the Fund "shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent . . . ." R.I. Gen. Laws § 27-34-6 (1970). In other words, the Fund would step into the shoes of American Mutual and take over that insurer's obligations and duties under the contract with Leviton.

American Mutual was obligated to cover all of the workers' compensation claims that arose during the periods of its coverage from 1983 to 1986. Pursuant to § 27-34-6 of the 1970 Act, the Fund stepped into the shoes of American Mutual and assumed those obligations. Application of the 1988 Act recoupment provision to workers' compensation claims arising during that time period changes the legal rights and obligations of Leviton and the Fund, leaving Leviton with no ability to enforce its rights under the contract with American Mutual as well as its rights under the then-existing law. The recoupment provision of the 1988 Act completely vitiates the contracts between American Mutual and Leviton. The entire purpose of the 1983, 1984 and 1985 insurance contracts was to provide insurance for Leviton in the event of workers' compensation claims during that year. In effect, the 1988 Act voids those contracts and places Leviton in the position as if the contracts never existed despite the fact that Leviton paid premiums on the American Mutual policies.

Therefore, it is clear that the contracts between Leviton and American Mutual, which were effectively assumed by the Fund, has been substantially impaired by the recoupment provision enacted as part of the 1988 Act.

B. The Recoupment Provision Of The 1988 Act Does Not Have A Legitimate Public Purpose.

A contractual impairment imposed by a legislative enactment will run afoul of the Contract Clause if it is not reasonable and necessary to carry out a legitimate public purpose. The recoupment provision of the 1988 Act fails this test because, despite unsubstantiated assertions by the Fund, there has been no evidence presented that the recoupment provision promotes the fiscal integrity of the Fund.

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 411-12, 103 S.Ct. at 704-05 (1983) (citation omitted).

There has been no evidence presented in this case that the recoupment provision is reasonable and necessary to carry out a legitimate public purpose. While the Fund took the position that the provision served to promote the Fund's fiscal integrity, there was no evidence offered in support of that proposition. *See Abbot* v. *City of Los Angeles*, 50 Cal.2d 438, 455, 326 P.2d 484, 493-94 (1958) (dismissing a contention of financial jeopardy as speculation only and without merit); *Singer* v. *City of Topeka*, 227 Kan. 356, 367-68, 607 P.2d 467, 476 (1980) (assertions of the need for financially sound pension fund rejected based upon lack of evidence that the funds were in jeopardy and lack of evidence that the defendant municipality would be unable to meet its obligations in the future).

Prior to the enactment of the recoupment provision, the Fund's only source of financing to pay claims was through assessments of member insurers, who, in turn, passed the assessments on to their insureds, including Leviton, in the form of higher premiums. R.I. Gen. Laws §§ 27-34-8 & 27-34-15 (1970). There is no evidence or legislative finding that the Fund cannot meet its obligations or that its financial

soundness will be impaired unless a recoupment provision limited to a $50 million net worth company is upheld. There has been no evidence presented by the Fund as to what companies other than Leviton are subject to the recoupment provision.[8]

The factual nature of the rational basis test is made especially clear in *Borman's, Inc.* v. *Michigan Property & Cas. Guar. Ass'n*, 925 F.2d 160 (6th Cir. 1991). In that case, the insured challenged a provision of the Michigan Property and Casualty Association Act that denies reimbursement of claims by any claimant whose net worth exceeds the statutory maximum. *Id.* at 161. Both parties presented extensive evidence to the trial court through several witnesses including a member of the General Counsel's Committee who reviewed the bill that eventually became the Michigan Property and Casualty Association Act. Based upon the evidence presented, the trial court held "that the classification of person and entities entitled to recover from the Association, based solely upon their net worth at a given time, is arbitrary and is not a classification which is rationally related to the Michigan legislature's purpose of allocating loss to those best able to absorb loss." *Borman's, Inc.* v. *Michigan Property & Cas. Guar. Ass'n*, 717 F.Supp. 468, 479 (E.D. Mich. 1989). On appeal, the Sixth Circuit concluded that since Michigan Property and Casualty Association had presented *some* evidence to support its claim of a rational relationship, the district court had exceeded its scope of review, and reversed the lower court's ruling. *Borman's*, 925 F.2d at 161. Here no such evidence was presented.

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[8] Leviton's subsidiary, AIWC, was sought to be subject to the recoupment provision only by imputing Leviton's net worth to such subsidiary.

C. The Alleged Legitimate Public Purpose Of The 1988 Act Is Not Sufficient To Justify The Impairment of Leviton's Contractual Rights

Even assuming, *arguendo*, that the recoupment provision serves a public purpose, that does not justify impairment of the contractual rights and obligations between Leviton and the Fund.

In order to survive a challenge to the contract clause, the "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *U.S. Trust Co. of New York*, 431 U.S. at 22, 97 S.Ct. at 1518 (citing *Blaisdell, infra*, 290 U.S. at 445-47, 54 S.Ct. at 242-43). Legislative alteration of rights and remedies under a private contract violate the Contract Clause if the legislation is neither reasonable nor necessary. *Id.* at 22-23, 97 S.Ct. at 1518.

In determining whether the legislation is reasonable and necessary, the severity of the impairment to the contract at issue must be considered.

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and parties are entitled to rely on them.

Allied Structural Steel, supra, 438 U.S. at 245, 98 S.Ct. at 2722-23 (1978).

There can be no question that the recoupment provision of the 1988 Act severely impairs the contractual obligations of the Fund as well as Leviton's contractual rights. Application of the recoupment provisions nullifies the express terms of the Fund's contractual obligations and "imposes a completely unexpected liability in potentially disabling amounts" upon Leviton. *Id.* at 247, 98 S.Ct. at 2724.

The legislation that so severely impaired the rights and obligations of Leviton and the Fund was neither reasonable nor necessary. There was no showing that this "severe disruption of contractual expectations was necessary to meet an important general societal problem." *Id.* The only indication of legislative intent in the record is the Fund's unsubstantiated assertion that the recoupment provision was enacted to preserve the fiscal integrity of the Fund. Even accepting the Fund's assertion, such a purpose cannot be considered a remedy for a broad, generalized economic or social problem. *See Blaisdell, supra,* 290 U.S. 398, 54 S.Ct. 231.[9] There has not even been a contention by the Fund that the legislation was enacted to deal with a situation of broad and desperate economic conditions such as existed in *Blaisdell. Id.* This legislation imposes a sudden, unanticipated and substantial retroactive obligation on Leviton. *See Allied Structural Steel,* 438 U.S. at 249, 98 S.Ct. at 2725. However, with no showing of the necessity to meet an important general social problem, "[t]he presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' simply cannot stand in this case." *Id.* at 247 (quoting *U.S. Trust Co. of New York,* 431 U.S. at 23, 97 S.Ct. at 1518).

The recoupment provision of the 1988 Act substantially impairs the contractual relationship between Leviton and the Fund, and serves no legitimate public purpose. Even assuming that the recoupment provision does serve some slight legiti-

[9] *Blaisdell* represents the very rare situation where, because of an emergency situation of the highest magnitude (the Great Depression), a certain degree of contractual impairment was held to be constitutionally tolerable.

mate public purpose, that purpose is insufficient to justify the impairment of Leviton's contractual rights. As such, as applied to Leviton, the recoupment provision of the 1988 Act violates the Contract Clause of the United States Constitution.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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RHODE ISLAND INSURERS' INSOLVENCY FUND
v.
LEVITON MANUFACTURING CO., INC.

C.A. No. 95-2505

SUPERIOR COURT OF RHODE ISLAND, PROVIDENCE COUNTY.

FILED MAY 16, 1996

DECISION

RAGOSTA, J.

*1 Before the court is plaintiff Rhode Island Insurers ' Insolvency Fund's (Fund) motion for partial summary judgment under R.C.P. 56(d) and motion to strike constitutional defenses under R.C.P.12(f). Decision is rendered herein.

Facts

The Fund is a non-profit, unincorporated legal entity created by the Rhode Island Insurers Insolvency Fund Act, G. L. 1956 (1994 Reenactment) 27-34-1 et seq. Under the act, insurers must pay into the Fund as a condition of transacting insurance in Rhode Island. If an insurer is declared insolvent, the Fund becomes obligated to pay the claims of Rhode Island residents covered by the insolvent insurer. Under G . L. 27-34-11 (2)(a), however, the Fund may seek reimbursement for such payments where the insured party had a net worth of $50 million on December 31 of the year next preceding the insurer's insolvency.

The defendant in this case purchased workers' compensation insurance from American Mutual Life Insurance Company (American Mutual). The policy ran from April 1, 1983

to April 1, 1986. On March 9, 1989, the Supreme Judicial Court of Massachusetts declared American Mutual insolvent. The Fund subsequently paid claims covered by American Mutual policies, including those of Leviton's employees. As of June 30, 1995, the Fund claimed to have paid a total of $1,553,070.35 to claimants under the American Mutual policy issued to Leviton.

Because Leviton had a net worth of $50 million on December 31, 1988 (the year next preceding American Mutual's insolvency), the Fund brought this action seeking reimbursement for moneys paid to Leviton employees under the policy. Leviton answered by challenging the constitutionality of the statute and by asserting several non-constitutional defenses. The Fund filed a motion to strike the constitutional defenses as well as a motion for partial summary judgment seeking a judgment for $1,553,070.35 and a declaration that the recoupment provision does not violate certain constitutional provisions.

Issues

Leviton contends that the statute is unconstitutional because it violates constitutional guarantees of equal protection and due process, it runs afoul of the Contract Clause, and it constitutes an impermissible taking. While the Fund argues that none of these arguments is meritorious, Leviton contends that each challenge presents a question of fact that precludes the entry of summary judgment. The questions presented for the court on this motion are 1) the test of constitutionality under each claim; 2) whether the tests can be applied in the context of a summary judgment action, and, if so, 3) whether the act passes constitutional muster after application of those tests. Each issue is addressed herein.

SUMMARY JUDGMENT STANDARD

In an ordinary civil case, the party moving for summary judgment bears the burden of proving that no material questions of fact exist and that the movant is entitled to judgment based on pure legal questions. Power v. City of Providence, 582 A.2d 895, 903 (R.I. 1990). In cases where the constitutionality of a statute is challenged, the party challenging the statute bears the burden of proving its unconstitutionality. Pawtucket v. Sundlun, 662 A.2d 40, 60 (R.I. 1995). This is true even where the party challenging the statute is the party

*2 opposing a summary judgment motion. Power, 582 A.2d at 904. A party challenging the constitutionality of a statute 'must convince the court beyond a reasonable doubt that the act is contrary to a provision either expressly stated in the State or the Federal Constitution or necessarily implied from language therein.' In re Advisory Opinion to the Governor (DEPCO), 593 A.2d 943, 946 (R.I. 1991).

EQUAL PROTECTION

A. Test for Constitutionality [FN1]

Legislation that does not involve a fundamental right or a suspect classification satisfies the guarantee of equal protection if that legislation is rationally related to a legitimate state interest. Pawtucket, 662 A.2d at 60 (quoting New Orleans v. Dukes, 427 U.S. 297, 303, 95 S. Ct. 2513, 2516-17 (1976)). 'Economic and social regulation is considered the classic area where rational basis analysis is applied.' Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 737 (R.I. 1992). 'The Equal Protection Clause is violated only if the legislative classification rests on grounds wholly irrelevant to the achievement of the State's objective.... A statutory discrimination may not be set aside if any state of facts reasonably may be conceived to justify it.' Kennedy v. State, 654 A.2d 708, 712 (R.I.1995) (quoting McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)).

B. Application in Summary Judgment Context

'In regard to the rational basis test, whether the act serves a legitimate objective and whether the act is rationally related to that objective, are questions of law.' Power. 582 A.2d at 902.

C. Constitutionality of Statute

In challenging the constitutionality of the statute under the rational basis test, Leviton faces a heavy burden. Recognizing this, Leviton argues that the test is 'inherently factual,' and thus unresolvable on a summary judgment motion. Unfortunately for the defendants, the Power decision completely forecloses this line of reasoning. [FN2]

Turning to the merits of the test, the court is persuaded by the reasoning contained in Borman's Inc. v. Michigan Property & Casualty Guaranty Assoc., 925 F.2d 160 (6th Cir. 1991) cert. denied 112 S.Ct. 85 (1992). In Borman's, the court addressed the constitutionality of a statute excluding from coverage insureds whose net worth exceeded a statutorily calculated minimum. In upholding the statute, the court found net worth to be an appropriate means of predicting the ability of a company to absorb unexpected loss. Id. at 163.

*3 That rationale applies with equal force here. There is a state of facts that justifies the Legislature' s classification in this matter. As the Borman's court concluded, 'the legislature conceivably may have concluded that the ease of administration and the preservation of limited fund resources for legitimate claimants justified the adoption of the rough net worth standard rather than a more precise mechanism of individual determination.' Id. at 164. Accordingly, the statute does not violate the Equal Protection Clause of either the Rhode Island or United States Constitutions.

DUE PROCESS—RETROACTIVITY

A. Test for Constitutionality

The first step in evaluating Leviton's due process claim is to determine whether the statute is retroactive in nature. See

Brown, 659 A.2d at 102. The test for determining whether a statute operates retroactively is whether the law changes the legal consequences of acts completed before its effective date. Weaver v. Graham, 450 U.S. 24, 41, 101 S. Ct. 960, 971 (1981). A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to its enactment. Metropolitan Property & Casualty Insurance Co. v. Rhode Island Insurer's Insolvency Fund, 811 F. Supp. 54, 58 (D. R.I. 1993). Rather, determination of whether a statute's application in a particular circumstance is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the effective date. McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13, 16 (1st Cir. 1993)

If, after applying this analysis, the statute is deemed to operate retroactively, its constitutionality must then be measured. [FN3] Retroactive aspects of legislation must meet the test of due process. Pension Benefit Guaranty Corp v. R.A. Gray, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984); Brennan v. Kirby, 529 A.2d 633, 639 (R.I. 1987). Laws concerning economic regulation that do not burden fundamental rights pass constitutional muster if they are justified by a rational legislative purpose. R.A. Gray, 467 U.S. at 730, 104 S. Ct. at 2718. Retroactive legislation is deemed to be rationally based and therefore constitutional if, by examining its explicit and implicit purposes and justifications, it can be concluded that the public interest in retroactivity outweighs the unfairness of retroactivity, the latter being measured best by the party's reliance on the preexisting state of the law. Brennan, 529 A.2d at 640 (quoting Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 727 (1960)).

*4 *B. Application in Summary Judgment Context*

The threshold question of whether a statute operates retrospectively is a question of law. See McAndrews v. Fleet

Bank of Massachusetts, N.A., 989 F.2d 13, 16 (1st Cir. 1993) (making threshold determination in context of summary judgment motion). If the statute does operate retroactively, its constitutionality is measured by the rational basis test, which also presents a question of law for the court. See Power, 582 A.2d at 902; see also Brennan, 529 A.2d at 639-40 (applying test on certified question).

C. Constitutionality of Statute

The threshold question regarding the due process claim is whether the statute operates retroactively. Leviton argues that this question presents an issue of fact, thus precluding the entry of summary judgment. The court disagrees. In McAndrews, the court addressed the plaintiff's claim that a federal statute operated retroactively so as to violate his due process rights. The statute provided that the FDIC, acting as a receiver, could enforce contracts previously entered into by failed banks notwithstanding contractual provisions to the contrary. As a result, the plaintiff lessor was unable to enforce a termination-upon-insolvency clause contained in a lease. Because Congress enacted the statute after the lease was executed, the plaintiff argued that the statute operated retroactively. The court rejected this argument, noting that a statute is not deemed retroactive 'simply because its application requires some reference to antecedent facts.' Id. at 16. Rather, 'a statute's application is usually deemed prospective when it implicates conduct occurring on or after the effective date.' Id. Applying these principles, the court found the statute to be prospective in nature because it was triggered by circumstances (including the tenant's insolvency, the FDIC's appointment as a receiver, and the landlord's attempt to utilize the lease's escape hatch) occurring after the statute's effective date. The same is true here. Section 27-34-11(2)(a) was triggered by circumstances occurring after the statute's effective date, including American Mutual's insolvency and the Fund's payment of claims. The court's finding that 27-34-11(2)(a) does not operate retroactively eliminates the need to examine the statute's constitutionality. Even if the

statute could be characterized as having some retroactive aspect, however, it still meets the minimal test of constitutionality under the Due Process Clause. As addressed earlier, a rational relationship exists between the statute and a legitimate public purpose.

IMPAIRMENT OF CONTRACT

A. Test for Constitutionality

*5 Under Article I, 10 of the United States Constitution, '[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts.' [FN4] While this clause appears to present an absolute bar to impairment, courts have refused to read the language with literal exactness. Brennan, 529 A.2d at 631.

The threshold inquiry under the Contract Clause is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L.Ed.2d 569 (1983). 'This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship and whether the impairment is substantial.' General Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109 (1992).

If substantial impairment exists, the court must determine whether the state has a significant and legitimate public purpose behind the regulation. Energy Reserves Group, 459 U.S. at 411, 103 S. Ct. at 704. If there exists such a purpose, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Id. at 412, 103 S. Ct. at 705.

B. Application in Summary Judgment Context

Determination of whether a statute violates the Contract Clause does not present an issue of fact. See In re Advisory Opinion (DEPCO), 593 A.2d at 948-49 (applying test in con-

text of request for advisory opinion); Brennan, 529 A.2d at 638-39 (applying test on certified question).

C. Constitutionality of Statute

The Fund argues that the statute does not impair the contract between Leviton and American Mutual because Leviton retains a cause of action against the receiver of American Mutual. The Fund contends that any impairment of the contract stems from American Mutual's insolvency, not from the operation of the statute. Leviton argues that the recoupment provision not only substantially impairs the contract between the parties but also does so without a legitimate public purpose. On the latter issue, Leviton contends that the Fund has failed to meet its burden of producing evidence to show that the statute has such a purpose.

The court finds that Leviton has failed to hurdle the threshold inquiry on this issue. The statute does not impair the contract between Leviton and American Mutual. Even if substantial impairment did exist, however, it is clear the state has a significant and legitimate public purpose behind the regulation: preservation of the Fund's limited resources. See Energy Reserves, 459 U.S. at 411-12, 103 S. Ct. at 704-05 (remedying broad and general economic problems constitutes legitimate public purpose).

TAKINGS CLAIM

*6 *A. Test for Constitutionality*

The Fifth Amendment to the United States Constitution and Article I, 16 of the Rhode Island Constitution prohibit the taking of private property for public use without payment of just compensation. [FN5] In identifying a taking forbidden by the Takings Clause, three factors should be considered: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25, 106 S. Ct. 1018, 1026 (1986).

B. Application in Summary Judgment Context

Application of the Connolly test does not present an issue of feet for the court. See In re Advisory Opinion (DEPCO), 593 A.2d at 949 (applying test in context of request for advisory opinion); see also Connolly, 475 U.S. at 220-21, 106 S. Ct. at 1023-24 (applying test in context of summary judgment motion); McAndrews, 989 F.2d at 18 (same).

C. Constitutionality of Statute

The Fund argues that application of the three-part Connolly test is unnecessary because, as a threshold matter, there has been no taking of private property for public use. The Fund relies on Connolly for the proposition that where the government has not taken property for public use, the Fifth Amendment provides no avenue of relief. Leviton responds by contending that while the issue is factual in nature, even at this stage it is clearly conceivable that the statute constitutes an unconstitutional taking under Connolly.

Examination of 27-34-11(2)(a) under the Connolly test reveals that obligations imposed by the statute do not constitute a compensable taking under the Fifth Amendment. As the Fund accurately points out, the 'character of the governmental action' in this case is such that 'the state cannot be said to have appropriated any of [Leviton's] assets to its own use.' Metropolitan, 811 F. Supp. at 59.The fact that the statute serves the public purpose of preserving limited fund resources does not automatically mean that an assessment under its provisions constitutes a taking for public use. Rather, the statute serves to 'adjust the benefits and burdens of economic life and promote the common good and. . . does not constitute a taking requiring Government compensation.' Connolly, 475 U.S. at 225, 106 S. Ct. at 1026.

NON-CONSTITUTIONAL DEFENSES

Leviton argues that its defenses of breach of contract, waiver, estoppel, and failure to mitigate preclude the entry of summary judgment in this matter. The court finds that

with respect to the amount owed by Leviton, the mitigation defense presents an issue of fact. Despite the Fund's ability to document the amount that it has paid out on covered claims for Leviton employees, a factual issue exists as to the reasonableness of those payments. Presumably this issue will be resolved after Leviton has reviewed the claim files relevant to this matter. Prior to such review, however, summary judgment as to the amount owed by Leviton is premature.

CONCLUSION

*7 The plaintiff's motion for partial summary judgment is granted as to the defendant's constitutional defenses, but denied as to the non-constitutional defenses. Stated another way, the court finds 27-34-11 (2)(a) to be constitutional but finds that an issue of fact remains as to the amount that the Fund may recover.

The court also denies the plaintiff's motion for partial summary judgment on count II of the complaint. The court declines to issue an order entitling the plaintiff to all future payments made on covered claims of Leviton employees, because while the court finds that recovery of such payments is constitutionally permissible, any non-constitutional defenses that apply with respect to past payments would necessarily apply in the future as well.

With respect to all of the above, counsel shall prepare the appropriate order for entry.

FN1. Leviton argues that the 27-34-11(2) (a) violates the guarantees of equal protection contained in both the United States and Rhode Island Constitutions. Because the respective guarantees provide the same level of protection, it is unnecessary to engage in a separate inquiry under both constitutions. See Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95, 100 (R.I. 1995).

FN2. At the hearing on this matter, counsel for Leviton conceded that Power severely undercut her argument. In an attempt to avoid the case's holding, she claimed to have cited Rhode Island cases in her memorandum which ran contrary to Power. Tr. 4/16/96 at 59. After a thorough review of the memorandum as well as independent

research, however, the court has been unable to locate this purported authority.

FN3. Leviton again argues that the due process guarantees of both the United States and Rhode Island Constitutions have been violated. The state constitutional provision provides no greater protection, however, and therefore only a single analysis is required. See Brown, 659 A.2d at 101-02 (analyzing state and federal due process challenges under United States Constitution only).

FN4. The Rhode Island Constitution also contains a prohibition against laws that impair contractual relations. See R.I. Const., art. I, 12. The Rhode Island Supreme Court has expressly refused to rule that the that state provision places any greater restriction on state legislation, see Brennan, 529 A.2d at 638 n.7, thus negating the need for separate review here.

FN5. The Rhode Island provision affords the defendant no greater protection. See In re Advisory Opinion (DEPCO), 593 A.2d at 949 (applying Connolly test to claims under both provisions). As a result, separate analyses are unnecessary.

SUPREME COURT OF Rhode Island.

RHODE ISLAND INSURERS' INSOLVENCY FUND

v.

LEVITON MANUFACTURING COMPANY INC. et al.

No. 96-417-Appeal.

July 24, 1998.

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MELISSA M. HORNE, ALLEN P. RUBINE, DEMING E. SHERMAN, KIMBERLY ANN O'CONNELL; REBECCA TEDFORD PARTINGTON, Providence, for Defendants.

Before WEISBERGER, C.J., and LEDERBERG, BOURCIER, FLANDERS and GOLDBERG, JJ.

OPINION

GOLDBERG, Justice.

*1 This is an appeal from the entry of partial summary judgment in favor of the plaintiff, **Rhode Island Insurers'** Insolvency Fund (the fund). The defendants, **Leviton** Manufacturing Company, Inc. (Leviton), and its wholly owned subsidiary corporation, American Insulated Wire Corporation(AIW), were insured for workers' compensation liability by American Mutual Life Insurance Company (American Mutual). On March 9, 1989, however, American Mutual was declared insolvent, and the fund assumed American Mutual's obligations. Both Leviton and AIW appeal from a partial summary judgment entered in accordance with Rules 54(b) and 56 of the Superior Court Rules of Civil Procedure, which granted judgment for the fund with respect to the constitutional defenses raised by the defendants. We affirm.

The fund is a nonprofit, unincorporated legal entity established by the Legislature as a means to guarantee payments to an insured in the event an insurer becomes insolvent and is unable to discharge its obligations. See G.L.1956 § 27-34-2. Designed to protect both claimants and policyholders from the catastrophic consequences of an insurer's insolvency, the fund's income is derived from assessments made upon all insurers transacting business in Rhode Island. See McGuirl v. Anjou International Co., 713 a.2d 194, 197 (R.I.1998); Medical Malpractice Joint Underwriting Association of Rhode Island v. Rhode Island Insurers' Insolvency Fund, 703 A.2d 1097, 1100 (R.I.1997). See also § 27-34-2. Such protection, however, is not absolute, and payment is limited to "covered claims" made in the specific circumstances set forth in the Rhode Island Insurers' Insolvency Fund Act (act). See Bassi v. Rhode Island Insurers' Insolvency Fund, 661 A.2d 77, 80 (R.I.1995); Whitehouse v. Rumford Property and Liability Insurance Co., 658 A.2d 506, 508 (R.I.1995). We have consistently construed the act in accordance with the public policy considerations that support the objectives of the statute. See Medical Malpractice Joint Underwriting Association, 703 A.2d at 1102; Bassi, 661 A.2d at 80.

In 1988, one year before American Mutual's insolvency and two years after the expiration of Leviton's and AIW's insurance policies, the General Assembly repealed the entire act and enacted P.L.1988, ch. 407. The prior enactment, P.L.1970, ch. 166, specifically provided that "the fund shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out." P.L.1970, ch. 166 (§ 27-34-8(f)). The 1988 enactment (P.L.1988, ch. 407), howeve did not afford such blanket immunity to all insureds and incl ded a provision, § 27-34-11(b)(1), [FN1] which permitted ..e fund to recover all amounts paid on behalf of an insured with a net worth in excess of $50 million. Section 27-34-11, entitled "Effect of paid claims," states in pertinent part:

"(b) The fund shall have the right to recover from the following persons the amount of any 'covered claim' paid on behalf of the person pursuant to this chapter:

*2 "(1) Any insured whose net worth on December 31 of the year next preceding the date the insurer became an insolvent insurer exceeded fifty million dollars ($50,000,000) and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter."

On May 13, 1993, the fund filed a complaint in Providence County Superior Court, alleging that it had made payments in excess of $1 million on Leviton and AIW's behalf. Furthermore the fund alleged that Leviton had a net worth in excess of $50 million and that together Leviton and AIW had a combined net worth in excess of $50 million. [FN2] Thus, pursuant to § 27-34-11(b)(1) the fund demanded full recovery for the sums it had previously paid to defendants as a result of American Mutual's insolvency.

[1] The defendants asserted numerous affirmative defenses to the fund's claim, including several challenges to the constitutionality of subsection 11(b)(1). The fund moved for partial summary judgment with respect to the constitutional claims, as well as a monetary judgment against Leviton but not against AIW. In addition the fund also sought an order declaring Leviton liable for all future payments made by the fund. Following a hearing in Superior Court, the trial justice issued a well reasoned written decision awarding partial summary judgment in favor of the fund. The trial justice found that there coupment provision did not violate the equal-protection clause, the due-process clause, or the contract clause of the United States Constitution or the Constitution of the State of **Rhode Island.** [FN3] The trial justice, however, declined to issue a monetary judgment against **Leviton,** finding that a genuine issue of material fact exists with respect to the amount the fund may recover. The trial justice also declined to issue an order entitling the fund to all future payments.

On appeal defendants urge this Court to reverse the decision of the trial justice and to declare § 27-34-11 (b)(1) in violation of the equal-protection clause of the United States and Rhode Island Constitutions because it creates an impermissible classification without promoting a legitimate governmental purpose. The defendants also contend that the application of the statute violates the due process clause of the United States and the Rhode Island Constitutions because the statute is applied retroactively to insurance policies that were purchased, and even expired, before the effective date of the recoupment provision. Finally, defendants allege that subsection 11(b)(1) violates the contract clause of the United States and Rhode Island Constitutions because it impairs their contractual relationship with American Mutual without a legitimate governmental purpose for this impairment.

STANDARD OF REVIEW

[2][3] Rule 56(c) of the Superior Court Rules of Civil Procedure authorizes a trial justice to enter summary judgment in favor of a moving party in circumstances in which a careful and conscientious review of the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted by the parties, demonstrates that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. See Senn v. MacDougall, 639 A.2d 494, 495 (R.I.1994); Golderese v. Suburban Land Co., 590 A.2d 395, 396 (R.I.1991). In cases that challenge the constitutionality of a statute, the party challenging its validity bears the burden of proving that the statute is unconstitutional. See Power v. City of Providence, 582 A.2d 895, 903 (R.I.1990). Therefore, defendants, although the nonmoving parties in this summary judgment arena, nonetheless bear the burden of establishing that 27-34-11(b)(1) is unconstitutional. Furthermore, because acts of the Legislature enjoy the presumption of constitutionality, see Burrillville Racing Association v. State, 118 R.I. 154, 157, 372 A.2d 979, 982 (1977), defendants bear the burden of

demonstrating its unconstitutionality beyond a reasonable doubt. See State v. Beck, 114 R.I. 74, 77, 329 A.2d 190, 193 (1974). Against this backdrop we begin our analysis.

EQUAL-PROTECTION CLAIM

*3 Leviton argues that as applied in this case, § 27-34-11 (b)(1) violates the equal-protection guarantees of the Fourteenth Amendment to the United States Constitution and article 1, section 2, of the Rhode Island Constitution. Because these provisions provide for similar protections, a separate analysis is unnecessary. See Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95, 100 (R.I.1995).

[4] It is well settled that any equal-protection analysis begins with an examination of the nature of classification created by the Legislature. Id. When the classification does not involve a fundamental right and is not related to a suspect classification, the test for constitutionality is more relaxed. See City of Pawtucket v. Sundlun, 662 A.2d 40, 60 (R.I.1995). In these circumstances the legislation need only be "rationally related to a legitimate state interest" in order to survive constitutional scrutiny. Id. (quoting New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517 (1976) (per curiam)).

[5][6] In this case we note that § 27-34-11(b)(1) is designed to accomplish a purely economic purpose, that is, to preserve the limited resources of the fund by requiring insureds with a net worth in excess of $50 million to reimburse the fund for all payments made in the course of discharging the insured's liability. "Economic and social regulation is considered the classic area where rational basis analysis is applied." Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 737 (R.I.1992). Thus with respect to economic legislation it is only when the classification created by the statute is determined to be "wholly irrelevant to the achievement of the State's objective," Kennedy v. State, 654 A.2d 708, 712 (R.I.1995) (quoting McGowan v. Maryland, 366 U.S. 420,

425-26, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399 (1961)), that the equal-protection clause will be impaired. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Kennedy, 654 A.2d at 712 13 (quoting McGowan v. Maryland, 366 U.S. at 425-26, 81 S.Ct. at 1105, 6 L.Ed.2d at 399). Thus, when a challenged economic statute responds to a legitimate legislative concern and that statute may achieve a resolution of that problem, it must be sustained on equal-protection grounds. See Kennedy, 654 A.2d at 712.

In this case the trial justice relied on the reasoning articulated in Borman's Inc. v. Michigan Property & Casualty Guaranty Association, 925 F.2d 160 (6th Cir.1991). In Borman's the Sixth Circuit Court of Appeals addressed the constitutionality of a Michigan statute that excluded from coverage insureds with a net worth in excess of a statutorily calculated maximum. Id. at 161. In upholding the statute, the Borman court held that a company's net worth was an appropriate measure to employ in determining an insured's ability to absorb a loss. Id. at 164. Likewise, although we acknowledge that our Legislature could very well have selected a higher net worth minimum, or some other criterion, we agree with the Sixth Circuit' s reasoning and conclude that a $50 million net worth threshold is reasonable and rationally related to the public purpose underlying the act.

*4 Moreover, the fact that § 27-34-11 (b)(1) provides for recovery of payments, as opposed to an outright denial of coverage, is further evidence of the Legislature's intention to deliver benefits to those in immediate need, in this case, Leviton's injured workers. By mandating that the fund step into the shoes of the insolvent insurer and pay all covered claims without regard to a company's net worth, the Legislature has clearly evinced its intention that benefits first be paid to injured employees. The Legislature's decision to include a recoupment provision applicable to companies with net worths in excess of $50 million merely ensures that sufficient funds will be available to accomplish this important objective.

Thus we are satisfied that § 27-34-11(b)(1) is rationally related to a legitimate state interest and therefore does not violate the equal protection guarantees afforded by the State and the Federal Constitutions. We also agree with the trial justice that "whether the act serves a legitimate objective and whether the act is rationally related to that objective, are questions of law" capable of resolution on the basis of this record. See Power, 582 A.2d at 902.

DUE-PROCESS CLAIM

[7] Next Leviton presses a due-process challenge to § 27-34-11(b)(1) on the ground that this provision operates retroactively as applied to the facts of this case. The defendants argument is premised on the fact that the American Mutual policies were in effect from 1983 to 1986, yet the fund seeks recoupment pursuant to a statute enacted in 1988. Indeed defendants suggest that because these injuries occurred at a time when the fund was prohibited from seeking reimbursement, see P.L.1970, ch. 166 (§ 29-34-8(f)), they were entitled to rely on the law as it existed when the contractual obligations were undertaken. Leviton also argues that the statute deprived defendants of any advance notice regarding potential liability and therefore denied defendants the opportunity to bring its settled expectations into conformity with the requirements of the new law. Accordingly Leviton alleges that in this case the application of the 1988 recoupment provision to insurance policies that had expired in 1986 deprives defendants of substantive due-process rights.

[8][9][10] "Due process prohibits legislation that would retroactively unreasonably impair substantive rights, or 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" Brown, 659 A.2d at 102 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229, 262 (1994)). Only when the adverse effects of the statute are activated by events that occurred before the effective date of its enactment

will the statute's reach be declared retrospective. See McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13, 16 (1st Cir.1993). "The determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." Id. Thus, the answer to the threshold question in determining whether § 27-34-11(b)(1) operates retroactively hinges on whether the triggering event occurred before or after the statute's effective date. In this case we conclude that the triggering event occurred after the statute's 1988 enactment.

*5 At the outset we acknowledge that these policies were purchased by Leviton at a time when state law barred the fund from seeking recovery from any insured and that the policies had expired two years before the recoupment provision was enacted. We also recognize that Leviton may have relied upon the then-existing law at the inception of the contracts. None of these factors, however, reduced American Mutual's obligations under the policies, and none of these factors triggered the fund's right of recovery. Rather the triggering factor was the subsequent insolvency of American Mutual in March 1989, an event that occurred well after the enactment of § 27-34-11(b)(1) . The fact that the work-related injuries giving rise to these claims occurred prior to the effective date of the act is not controlling since the fund was not obligated to pay these claims. In addition merely entering into contracts for insurance to discharge one's potential workers' compensation liability does not in itself implicate the recoupment provision of the act. Rather it is the subsequent insolvency of the insurer and the concomitant obligation to pay the statutorily mandated claims that triggered the statute. The trial justice determined that American Mutual's insolvency occurred on March 9, 1989, well after the effective date of the 1988 act, and that, therefore, defendants' due-process rights were not violated. We agree with this analysis, which is consistent with our precedent.

[11] In Liberty Mutual Ins. Co. v. Rhode Island Insurers' Insolvency Fund, 675 A.2d 417, 418 (R.I.1996) (mem.), we determined that "the date an insurer becomes insolvent [is] the pivotal date in determining whether the July 1988 act applies to a given claim." We further declared that "the [1988] version of the [a]ct applies to claims involving an insurer that became insolvent on or after July 1, 1988." Id. Therefore, in the context of a retrospective analysis, the date the insurer becomes insolvent is the controlling criterion and not the date that gives rise to the claim. Consequently it is our opinion that this statute does not operate retroactively and it is therefore unnecessary for us to analyze § 27-34-11(b)(1) further with regard to defendants' due-process rights.

CONTRACT CLAIM

[12] The final challenge to the constitutionality of § 27-34-11(b)(1) is that the 1988 recoupment provision violates the prohibition against the impairment of contracts found in article 1, section 10, of the United States Constitution and article 1, section 12, of the Rhode Island Constitution. The contract clauses of both the State and the Federal Constitutions limit the power of the government to enact laws that either modify its own contracts or impair the obligations of a private party to a contract. See Brennan v. Kirby, 529 A.2d 633, 638 (R.I.1987). While acknowledging that the responsibility for the payment of workers' compensation benefits ultimately rests with Leviton, defendants argue that they "made a conscious business decision to shift that liability to American Mutual by purchasing an insurance contract." Thus, Leviton insists, it had a reasonable expectation that its contract with American Mutual would result in complete indemnification for any workers' compensation liability that it incurred during the policy periods and that this expectation was eliminated by the 1988 enactment of the recoupment provision.

*6 [13][14] We have previously adopted the three pronged test employed by the United States Supreme Court to determine whether legislation unconstitutionally impairs the obli-

gation of contracts. See Brown, 659 A.2d at 106. "First, has the state law, in fact, substantially impaired a contractual relationship?" Id. (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569, 580 (1983)). "Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation[?]" Brown, 659 A.2d at 106. Third, is the modification of the rights and responsibilities of the parties to the contract nonetheless reasonable and appropriate in light of the public purpose that underlies the legislation? Id. We conclude that defendants have failed to meet the first-prong of this test and therefore cannot demonstrate the impairment of any contractual obligation.

The statute under attack in this case clearly does not have an impact on any putative contractual obligations of the State of Rhode Island, see Retired Adjunct Professors of Rhode Island v. Almond, 690 A.2d 1342 (R.I.1997), or its political subdivisions, see Brennan, supra. Rather the facts of this case are more akin to the constitutional challenge to the Depositors Economic Protection Corporation (DEPCO) legislation enacted in response to the state's credit union crisis. See Brown, 659 A.2d at 98. The DEPCO legislation created an entirely new receivership law for failed financial institutions and eliminated the protections afforded by G.L.1956 chapter 10 of title 6, entitled the "Uniform Contribution Among Joint Tortfeasors Act." Brown, 659 A.2d at 99. As a result a non-settling party found liable in a lawsuit brought pursuant to the DEPCO act could no longer look to other joint tortfeasors who did not pay their proportionate share of liability. Id. "[U]nder the DEPCO Act a tortfeasor who refuses to settle, but is later found liable at trial, may not bring an action against a settler for contribution and is limited to deducting the full amount of any settlements by joint tortfeasors from the judgment against it." Id. In rejecting a challenge to the DEPCO statute on the ground that it impermissibly impaired the contract rights of potential defendants, this Court

declared that no contract rights were implicated in the enactment. Id. at 106. We stated,

> "The Uniform Contribution Among Joint Tortfeasors Act * * * as the common law that preceded it (wherein no contribution was provided among joint tortfeasors), arises out of the law of the state and not from any private agreement." Id.

Leviton suggests that the provisions of the 1970 fund act set forth the obligations of the insurer, the insured, and the fund in the event of an insolvency and was thus a critical factor in the parties' agreement. The defendants maintain that because the policies were purchased with the expectation that the fund would become a secondary insurer in the event of American Mutual's insolvency, any alteration affecting this expectation results in the impermissible impairment of Leviton's contract rights. The inherent defect in this argument, however, is the fact that the fund is not a party to the insurance policies and did not undertake any action to impair Leviton's contract. The fund's responsibilities are statutorily mandated and are not created by or subject to any private agreements. It is therefore our opinion that the parties' contractual relationship was impaired by the insolvency of merican Mutual in 1989 and its ubsequent inability to perform the agreement, not by the enactment of the 1988 recoupment provision.

*7 Leviton also argues that the General Assembly, by amending the act in 1988, legislated away the safeguards built into the contracts and left defendants with no ability to enforce their rights under the policies. Leviton maintains that § 27-34-11(b)(1) substantially impaired its contracts with American Mutual by placing it in the same position it would be in if the insurance contracts had never existed, despite the fact that Leviton had paid premiums on the policies. This is simply not the case.

[15] In the recent case Retired Adjunct Professors, supra, we were called upon to scrutinize legislative amendments to the state's pension laws that reduced the amount of part-time

state work a professor could perform before his or her state-pension benefits would be suspended. 690 A.2d at 1344. Although we acknowledged that "in deciding to retire, plaintiffs may have relied on the potential availability of future reemployment offers from the State * * * [plaintiffs] were not entitled to conclude that these provisions were fossilized in legislative amber." Id. at 345. We also stated that "[t]he mere fact that a state enacts laws that benefit the interests of some people does not automatically create contract rights to those benefits." Id. We are of the opinion that this reasoning is equally applicable to the facts in this case since

> "[m]ere reliance by benefited parties on the legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future, no matter how reasonable they may seem at the time, cannot create a legislative intent to establish enforceable contractual rights that is not otherwise manifest in the words of the legislation." Id. at 1346.

Accordingly we conclude that § 27-34-11(b)(1) does not impair the contract clause of the State and the Federal Constitutions.

In conclusion we are satisfied that § 27-34-11(b)(1) is constitutional legislation. We conclude that subsection 11(b)(1) is economic legislation enacted by the General Assembly, rationally related to a legitimate public purpose, and that does not violate the defendants' equal-protection guarantees under the State and the Federal Constitutions. Furthermore we are satisfied that § 27-34-11(b)(1) has no retrospective application as applied in this case, nor does it impair the contract rights of the parties.

Therefore, for the reasons set forth herein, the defendants' appeal is denied and dismissed, and the entry of partial summary judgment is affirmed. The papers in the case may be remanded to the Superior Court.

FN1. This section was originally identified in the 1988 act as G.L.1956 § 27-34-11(2)(a). It is presently codified at § 27-34-11(b)(1) of the act.

FN2. The parties agreed that Leviton's net worth for the years in question was in excess of $50 million. With respect to AIW's net worth, however, the parties were unable to agree, and AIW disputes the fund's method of calculating its net worth by combining its net worth with that of Leviton. Furthermore, for the purposes of this opinion defendants will be referred to collectively as "Leviton" or "defendants" unless otherwise specified.

FN3. The trial justice also found that the statute did not violate the takings clause of the United States Constitution. The defendants have not raised this issue on appeal, and therefore, it is deemed waived. See Montecalvo v. Mandarelli, 682 A.2d 918, 926 (R.I. 1996)

STATE OF RHODE ISLAND

SUPERIOR COURT

PROVIDENCE, SC.

RHODE ISLAND INSURERS' INSOLVENCY FUND,
Plaintiff
Vs.
AMERICAN INSULATED WIRE CORPORATION
and
LEVITON MANUFACTURING CO., INC.
Defendants

C.A. No. 93-2505

ORDER

The above matter came on hearing before Mr. Justice Ragosta on April 16, 1996 on Plaintiff's Motion for Partial Summary Judgment and Motion to Strike Constitutional Defenses, on both submission of memoranda and oral argument by counsel and, after hearing thereon, and upon due consideration thereof, it is hereby:

ORDERED, ADJUDGED AND DECREED:

1. The Court finds R.I.G.L. Section 27-34-11(2)(a) to be constitutional. Therefore, Plaintiff's Motion for Partial Summary Judgment that R.I.G.L. 27-34-11(2)(a) does not violate the due process clause, the impairment of obligation of contracts clause, the taking clause or the equal protection clause of the United States Constitution or the Rhode Island Constitution, is granted.

2. Plaintiff's Motion for Partial Summary Judgment as to all other issues is denied without prejudice.

3. Plaintiff's Motion to Strike is passed.

4. As to the Partial Summary Judgment, Paragraph 1 of this Order, the Court certifies that there is no just reason to delay

the entry of final judgment and therefore directs that this Order constitutes a final Partial Summary Judgment.

ENTERED as an Order of this Court the 4th day of June 1996.

ENTER:
s/ RAGOSTA, J.
DATED: 6/4/96

PER ORDER:
ILLEGIBLE

This Order prepared by:

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Art. I, § 10 Powers denied states. — No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid, by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Art. V Presentment or indictment — Double jeopardy — Self-incrimination — Due process — Compensation for private property. — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Art. XIV, § 1, Citzenship — Privileges and immunities — Due process — Equal protection of laws. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 166.

AN ACT Creating a Rhode Island Insurers' Insolvency Fund

It is enacted by the General Assembly as follows:

Section 1. Title 27 of the general laws, entitled "Insurance", as amended, is hereby further amended by adding thereto the following chapter:

CHAPTER 27-34

"Rhode Island Insurers' Insolvency Fund"

"27-34.1 TITLE-This chapter shall be known and cited as the Rhode Island insurers' insolvency fund act.

"27-34.2. FUND.—There is hereby created the Rhode Island insurers' insolvency fund which shall consist of three accounts: (1) Workmen's compensation account; (2) automobile account; and (3) all other coverges. The fund shall be responsible (a) for the investigation, adjustment, compromise, settlement and payment of covered claims; (b) for the investigation, handling and denial of non-covered claims; and (c) for the management and investigation of funds administered by the fund. The members of the fund shall be responsible (a) for the payment of assessments levied pursuant to section 9; (b) for adherence to the rules of the plan approved pursuant to section 7; and (c) other obligations imposed by this chapter.

"27-34-3. DEFINITIONS. — (a) "Insurer" or "company" means any corporation or organization licensed or chartered to engage in the writing of property or casualty insurance policies in this state, including the exchanging of reciprocal or inter-insurance contracts between individuals, partnerships and corporations, and any surplus lines insurance company authorized to write

property or casualty insurance policies in this state; (b) "insolvent insurer" means any insurer authorized to engage in the writing of property or casualty insurance policies for which a domicilary or ancillary receiver has been appointed in this state after the effective date of this act; (c) "Servicing insurer" means an insurer appointed by the insurers solvency board to act on behalf of the fund; (d) "Property and casualty insurance policies" or "policy" means any contract, of property, casualty or surety insurance, including any endorsements thereto and without regard to the nature or form of the contract or endorsements insuring against legal liability and or loss contingencies, but not limited to those which provide coverages as enumerated in chapters 6, 7, 9 and 15 of title 27 of Rhode Island general laws except: (1) Life insurance and annuities being that class of insurance referred to in chapter 4, title 27 of the Rhode Island general laws; (2) Accident and sickness insurance, being that class of insurance referred to in chapter 18, title 27 of the Rhode Island general laws; (3) Credit insurance, being that class of insurance referred to in chapters 30 and 31 of title 27 of the Rhode Island general laws; (4) Reinsurers when acting exclusively as reinsurers and not in a direct basis; (e) "Net direct written premiums" means direct gross premiums thereon and dividends paid or credited to policyholders; (f) "Commissioner" means the insurance commisioner of the state of Rhode Island; (g) "insolvency fund" or "Fund" means the insurers' insolvency fund established pursuant to section 7 of this act; (h) (1) "Covered claims" means a claim which:

(a) Arises out of property or casualty insurance policy issued by an insurer which was authorized to do an insurance business in this state either at the time the policy was issued or when the event for which insurance was provided had occurred; and

(b) is within any of the classes of claims under subsection (2) below.

(2) A claim shall not be paid unless it arises out of an insurable event under a property or casualty insurance policy and it is:

(a) The claim of a policyholder or insured, who at the time of the occurrence of the event for which insurance was provided was a resident of this state; or

(b) The claim of a person having an insurable interest in or related to property which was permanently situated in this state, or

(c) A claim under a liability or workmen's compensation insurance policy when either the insured or third party claimant was a resident of this state at the time of the occurrence of the event for which insurance was provided.

(3) A covered claim shall not include that portion of any first party claim which is in excess of the applicable limits provided in the policy.

(4) A covered claim shall not include that portion of any third party claim which is in excess of the applicable limits provided in the policy.

(5) A covered claim shall not include any obligation to insurers, insurance pools, underwriting associations or any person which has a net worth greater than $1,000,000 at the time of the insured event.

"27-34-4. PROPERTY AND CASUALTY INSURERS SUBJECT TO CHAPTER. — Every insurer authorized on or after the effective date of this chapter to write property or casualty policies in this state shall be a member of the insolvency fund as a condition of its authority to transact business in this state, and shall be liable for assessments pursuant to section 9 of this chapter and shall be responsible for the other obligations imposed pursuant to this chapter.

"27-34-5. DETERMINATION OF INSOLVENCY: NOTICE OF INSOLVENCY. — Upon the determination of a court of competent jurisdiction of the state of domicile of an insurer that such insurer is insolvent,

the commissioner of this state shall promptly give notice thereof, by first class mail, to all insurers subject to this act. The commissioner shall require each agent and/or surplus line broker of the insolvent insurer to give prompt written notice by first class mail, at the insured's last known address to each insured of the insolvent insurer for whom he was agent of record. If the insurer be domiciled in this state, notice shall also be given by the insurance commissioner by publication in a newspaper of general circulation published in the country where the insurer has its principal office not less than once per week, for four weeks, and by publication elsewhere in this state as the court may direct.

"27-34-6. OBLIGATIONS OF THE INSOVLENCY FUND. — In the event of the determination of insolvency of a licensed insurer after the effective date of this act, the coverage afforded by property and casualty insurance policies by such insurer shall, for a period of (a) 30 days from the date of such determination, or until (b) policy expiration date if less than thirty days, or until (c) such policy has been replaced by the insured within said sixty days, become the obligation of the fund. The fund shall be deemed to be the insurer for such period with respect to the extent of claims with all the rights, duties and obligations of the insolvent insurer, and the fund is hereby authorized to investigate, adjust, compromise and settle covered claims, or to investigate, handle and deny non-covered claims.

"27-34-7 CREATION AND MAINTENANCE OF INSURERS INSOLVENCY FUND. — There shall be created and maintained in this state by all insurers authorized to transact insurance in this state, except those authorized to transact life insurance and accident and sickness insurance or hospitalization insurance and reinsurers as defined in section 3, an association of such insurers to be known as the "Insurers' insolvency fund", hereinafter referred to as the fund, to provide coverage

in this state for residents and those non-residents with property permanently situated in this state against insolvencies of property and casualty companies. Every such insurer shall be a member of the fund as a condition of its authority to continue to transact insurance in this state.

"27-34-8. INSURERS' SOLVENCY BOARD: ORGANIZATION AND POWERS. — (a) There shall be in the insurance department an insurers' solvency board which shall consist of seven members. The commissioner of insurance shall be a member of the board and shall be its chairman and chief executive. The remaining six members, shall not be considered employees of the insurance department and shall be appointed as follows:

(1) The commissioner shall compile a list of the three stock insurers most likely to incur the largest assessment, per insurer, for each of the accounts under section 9, and he shall also compile a list of the three non-stock insurers most likely to incur the largest assessment, per insurer, for each of the accounts under said section 9. The commissioner shall solicit from the said eighteen insurers the names of eighteen individuals as nominees for membership to the insurers solvency board. The commissioner shall thereupon appoint one stock member and one non-stock member for each account.

(2) Each member so appointed shall serve for a term of three years and until his successor has been appointed and qualified, and in case of a vacancy for any reason in the office of any such member, the commissioner shall appoint a member to fill the unexpired term of such vacant office from the nominations as heretofore described.

(3) Reasonable expenses of the members of the insurers solvency board, incurred in attending meetings, shall be paid out of the fund on certification of the commissioner of insurance upon the audit and warrant of the

treasurer. The insurers solvency board shall hold its regular meetings at such time and places as shall be fixed by the board. The board shall meet at any time, on call on the commissioner of insurance. The commissioner shall call a meeting, upon not less than two days notice, upon the written request of any two members of the board. The board may by resolution provide for a shorter notice of a meeting by telegraph, telephone or otherwise. The board shall keep a record of all of its proceedings and shall appoint a secretary and such other officers as it deems necessary, who need not be members of the board. For the purpose of considering questions before it, the board shall have access to all the books, records, reports and papers in the insurance department, including all confidential communications, and the members of the board shall hold such communications as confidential.

(b) The insurers solvency board shall have power, by affirmative vote of four of its members, to examine, without previous advance notice, the assets, conditions and affairs of any insurer when the board believes that said insurer's further transaction of business may be hazardous to its policyholders or to its creditors, or to the public. Examinations by the insureds solvency board shall be conducted by independent certified public accountants and the expense thereof shall be borne by the Rhode Island insurers insolvency fund.

Said examination may extend to general agencies, management entities or affiliates of said companies with respect to matters affecting said companies. Said report of examination shall be furnished to the commissioner and held confidential until a hearing shall have been held or waived, pursuant to title 27. A refusal by a company, a general agency, a management entity or affiliate of a company to submit its books, papers, accounts, records or affairs to such examination shall be so reported to the commissioner and shall constitute grounds for suspen-

sion, rehabilitation, liquidation or conservation of the insurer within the purview of title 27 or for the license revocation of the agency, as the case may be. The board may also so examine the affairs of such insurer after formal adjudication of insolvency to assist in the conservation of assets, and said board shall furnish its report to the commissioner and also to the Rhode Island insurers insolvency fund.

(c) The insurers solvency board shall have power by an affirmative vote of four of its members to make recommendations to the commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of companies or persons engaged in the business of writing property or casualty insurance policies in this state.

(d) Reports and recommendations under this section shall not be considered public documents. There shall be no liability on the part of, and no cause of action shall arise against, member insurers, the fund or their agents or employees, the commissioner or his authorized representatives, for any statements made by them in any report or recommendations made hereunder.

(e) With the approval of the insurance commissioner, the insurers solvency board shall designate insurers to act on behalf of the fund to carry out the purposes of this act. The board may provide a procedure under which pending claims or judgments against the insolvent insurer, or its insureds, are assigned to the member companies designated to act for the fund. The assignee-insurer is hereby authorized to appear and defend a claim in a court of competent jurisdiction or otherwise and to investigate, adjust, compromise and settle a covered claim or to investigate, handle and deny a non-covered claim, and do so on behalf of and in the name of the fund. If an assignee-insurer pays the covered claim it shall be reimbursed by the fund or be entitled to set off said payment against future assessments. The

unreimbursed claim of such an insurer against the fund shall be an admitted asset of the insurer. Insureds entitled to protection of this act shall cooperate with the fund and the assignee-insurer.

(f) The fund shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out. The fund shall be subrogated to the rights of any insured or claimant, to the extent of a covered claim, to participate in the distribution of assets of the insolvent insurer to the extent that the fund has made payment. Any claimant or insured entitled to the benefits of this act shall be deemed to have assigned to the fund, to the extent of any payment received, his right against the estate of the insolvent insurer. The fund shall recieve the benefit of any reinsurance contracts or treaties entered into by the insolvent insurer which cover any of the liabilities incurred by the insolvent insurer with respect to covered claims. After determination of insolvency of any insurer, the fund shall be a party in interest in all proceedings involving policies insured or assumed by the fund with the same rights to receive notice and defend, appeal and review as the insolvent insurer would have had if solvent. All monies recovered under this section or any other section shall be added to the assessments collected under section 9.

"27-34-9. ASSESSMENTS. — (a) For the purposes of administration and assessment under this section, the fund shall be divided into three separate accounts: (1) Workmen's compensation insurance accounts; (2) Automobile insurance account; and (3) All other coverages insurance account. Separate assessment shall be made for each account. No assessment shall be levied for any account as long as the assets held in such account are sufficient to cover all estimated payments for liquidation in process under the account.

"27-34-9. ASSESSMENTS. — (a) For the purposes of administration and assessment under this section, the fund shall be divided into three separate accounts: (1) Workmen's compensation insurance account; (2) Automobile insurance account; and (3) All other coverages insurance account. Separate assessment shall be made for each account. No assessment shall be levied for any account as long as the assets held in such account are sufficient to cover all estimated payments for liquidation in process under the account.

(b) To the extent necessary to secure the funds for the respective accounts of the fund for the payment of covered claims and also to pay the reasonable costs to administer the fund, the commissioner, after receiving written notice that an insurer is insolvent, shall levy assessments in the proportion that each insurer's net direct written premiums in this state in the classes protected by the account bears to the total of said net direct written premiums received in this state by all such insurers for the preceding calendar year for the kinds of insurance included with such account. Assessments shall be remitted to and administered by the fund. Each insurer so assessed shall have at least thirty days written notice as of the date that the assessment is due and payable. Every assessment shall be made as a uniform percentage applicable to the net direct written premiums of each insurer in the kinds of insurance included within the account in which the assessment is made. Assessments shall be included as an appropriate factor in the making of rates.

(c) Any necessary and proper expenses incurred by an insurer, or the insurance department in the investigation, adjustment, compromise, settlement, denial or handling of claims shall, upon proper verification under the rules of the fund, entitle the insurer or insurance department to reimbursement. Any insurer whose employee serves on the staff of the fund may set off from its

assessment any necessary and proper expenses incurred by the insurer resulting from said service of its employee. An insurer which ceases to engage in the business of writing property or casualty insurance policies in this state shall have no right to a refund on any assessment previously remitted to the fund.

"27-34-10. PROCEDURE TO DETERMINE COVERED CLAIMS. — Except for (a) voluntary settlements or compromises between a claimant and an assignee-insurer (on behalf of the fund), or (b) a final judgment, other than a default judgment, against the insured or insurer in a court of competent jurisdiction rendered prior to the determination of insolvency of the insurer, the proof and allowance of a covered claim shall be governed by chapter 14 of title 27.

"27-34-11. PAID CLAIMS AS PROPER CLAIMS AGAINST INSOLVENT ESTATE. — As respects insolvent insurers incorporated in this state, the receiver, liquidator or statutory successor shall allow as a proper claim on the assets of the insolvent company amounts paid under the provisions of this act by or on behalf of the fund on or with respect to covered claims, and any statute of this state relating to the rights and duties of such receiver, liquidator or statutory successor is deemed amended to so provide.

As a condition of an insurer doing business in this state, all property and casualty insurance policies issued or renewed on or after the effective date of this chapter shall be deemed to provide that the insurer appoints the fund as its agent as respects investigation, adjustment, compromise and settlements of covered claims and agrees to reimburse the fund for any payment made under the terms of this chapter, and that such appointment and obligation shall be binding on any receiver, liquidator or statutory successor appointed to liquidate or wind up its affairs.

"27-34-12. OTHER INSURANCE. — Any person (including any individual, partnership, association or corporation) having a claim against his insurer under any insolvency provision contained in his insurance policy, which claim arises out of the insolvency of a participating insurer, shall be required to exhaust first his rights under such policy and his rights to recover such claim under the provisions of this chapter shall be reduced accordingly. Any amount paid a claimant in excess of the amount authorized by this chapter may be recovered by action brought by or on behalf of the fund.

"27-34-13. DUTIES OF THE COMMISSIONER. — The Commissioner shall promulgate and adopt such reasonable rules and regulations as are necessary to effectuate the provisions of this chapter. The commissioner shall sue for and recover, on behalf of the fund any assessment not paid when due. He may, after notice and hearing, revoke the certificate of authority to transact business in this state of an insurer, a member of the fund, which (a) shall fail to pay an assessment when due as provided in this chapter and after demand having been made, or (b) otherwise fail to comply with the requirements of the insurers' insolvency fund as approved pursuant to section 7 of this chapter. Any action taken by the commissioner shall be subject to judicial review as provided in sections 27-6-51 and 27-9-49 of the Rhode Island general statutes.

"27-34-14. INSOLVENCY FUND SUBJECT TO EXAMINATION. — The fund shall be deemed a company or insurer within the scope of sections 27-1-11 and 27-2-19 relating to examinations.

"27-34-15. INSOLVENCY FUND: LIMITATION ON TAXABILITY. — The fund shall be exempt from all license fees, income, franchise, privilege, occupation or other taxes levied or assessed by the state, any municipality, county or other political subdivision of the state, except state, county or municipal taxes upon the real or

personal property of the fund, which is to be assessed and taxed in the same manner as real property and personal property of other non-exempt persons.

"27-34-16. NON-DUPLICATION OF RECOVERY. — It is not the purpose of this chapter to provide or permit duplicate recoveries of covered claims under this chapter and an insolvency fund or its equivalent of any other state. In the construction and application of this chapter with respect to a covered claim which may be recoverable under this chapter and under an insolvency fund or its equivalent in another state, the sole recovery.

(a) with respect to a workmen's compensation claim, shall be under the insolvency fund or its equivalent of the state of residence of the claimant;

(b) with respect to a first party claim of an insured for damages to or destruction of property with a permanent location, shall be under the insolvency fund or its equivalent of the state where such property is permanently situated;

(c) with respect to any covered claim, shall be under the insolvency fund or its equivalent of the state of residence of the insured.

"27-34-17. TERMINATION, DISTRIBUTION OF FUND. — (a) The commissioner shall by order terminate the operation of the Rhode Island insurers' insolvency fund as to any kind of insurance afforded by property or casualty insurance with respect to which he has found, after hearing, that there is in effect a statutory or voluntary plan which:

(1) is a permanent plan which is adequately funded or for which adequate funding is provided; and

(2) extends, or will extend to the Rhode Island policyholders and residents and benefits with respect to insolvent insurers not substantially less favorable and effective to such policyholders and residents and the protection and benefits provided with respect to such kind of insurance under this chapter.

(b) The commissioner shall by the same such order authorize discontinuance of future payments by insurers to the Rhode Island insurers insolvency fund with respect to the same kinds of insurance; provided, that assessments and payments shall continue, as necessary, to liquidate covered claims of insurers adjudged insolvent prior to said order and the related expenses not covered by such plan.

(c) In the event the operation of any account of the Rhode Island insurers insolvency fund shall be so terminated as to all kinds of insurance otherwise within its scope, the fund as soon as possible thereafter shall distribute the balance of monies and assets remaining in said account (after discharge of the functions of the fund with respect to prior insurer insolvencies not covered by such other plan, together with related expenses) to the insurers which are then writing in this state policies of the kinds of insurance covered by such account, and which had made payments into such account, pro-rata upon the basis of the aggregate of such payments made by the respective insurers to such account during the period of five years next preceding the date of such order. Upon completion of such distribution with respect to all of the accounts specified in section 9, this chapter shall be deemed to have expired.

Sec. 2. This act shall take effect upon its passage

AN ACT RELATING TO INSURANCE

It is enacted by the General Assembly as follows:

SECTION 1. Sections 27-34-1, 27-34-2, 27-34-3, 27-34-4, 27-34-5, 27-34-6, 27-34-7, 27-34-8, 27-34-9, 27-34-10, 27-34-11, 27-34-12, 27-34-13, 27-34-14, 27-34-15, 27-34-16, 27-34-17 and 27-34-18 of Chapter 27-34 of the General Laws entitled "Rhode Island Insurers' Insolvency Fund" are hereby repealed in their entirety.

SECTION 2. **CHAPTER 27-34 OF THE GENERAL LAWS ENTITLED "RHODE ISLAND INSURERS' INSOLVENCY FUND" IS HEREBY AMENDED BY ADDING THERETO THE FOLLOWING SECTIONS:**

27-34-1. Title. — This chapter shall be known and may be cited as the Rhode Island insurers' insolvency fund act.

27-34-2. Purpose. — The purpose of this chapter is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, and to create an entity to assess the cost of such protection and distribute it equitably among member insurers.

27-34-3. Scope. — This chapter shall apply to all kinds of direct insurance, but shall not be applicable to the following:

(1) Life, annuity, health or disability insurance;

(2) Mortgage guaranty, financial guaranty or other forms of insurance offering protection against investment risks;

(3) Fidelity or surety bonds, or any other bonding obligations;

(4) Credit insurance;

(5) Insurance of warranties or service contracts;

(6) Title insurance;

(7) Ocean marine insurance;

(8) Any transaction or combination of transactions between a person (including affiliates of such person) and an insurer (including affiliates of such insurer) which involves the transfer of investment of credit risk unaccompanied by transfer of insurance risk.

27-34-4. Construction. — This chapter shall be liberally construed to effect the purpose under section 27-34-2 which will constitute an aid and guide to interpretation.

27-34-5. Definitions. — As used in this chapter:

(1) "Account means any one of the three accounts created by section 27-34-6.

(2) "Affiliate" means a person, who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with an insolvent insurer on December 31 of the year next preceding the date the insurer becomes an insolvent insurer.

(3) "Claimant" means any insured making a first party claim or any person instituting a liability claim; provided that no person who is an affiliate of the insolvent insurer may be a claimant.

(4) "Commissioner" means the commissioner of insurance of this state.

(5) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact.

(6) "Covered claim" means an unpaid claim, including one for unearned premiums, submitted by a claimant, which arises out of and is within the coverage and subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if such insurer becomes an insolvent insurer on or after July 1, 1988 and:

(a) the claimant or insured is a resident of this state at the time of the insured event, provided that for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event; or

(b) the property from which the claim arises is permanently located in this state. "Covered claim" shall not include any amount:

(a) awarded as punitive or exemplary damages;

(b) sought as a return of premium under any retrospective rating plan; or

(c) due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise; provided, that a claim for any such amount, asserted against a person insured under a policy issued by an insurer which has become an insolvent insurer, which, if it were not a claim by or for the benefit of a reinsurer, insurer, insurance pool or underwriting association, would be a "covered claim," may be filed directly with the receiver of the insolvent insurer, but in no event may any such claim be asserted against the insured of such insurer.

(7) "Fund" means the Rhode Island insurers insolvency fund created under section 27-34-6.

(8) "Insolvent insurer" means an insurer licensed to transact in this state any of the kinds of insurance within the scope of this chapter, either at the time the policy was issued or when the insured event occurred, against which an order of liquidation with a finding of insolvency has been entered on or after July 1, 1988 by a court of competent jurisdiction in such insurer's state of domicile or in this state under the provision(s) of Section 27-14-1 et seq., which order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order.

(9) "Member insurer" means any person who:

(a) writes any kind of insurance to which this chapter applies, including the exchange of reciprocal or interinsurance contracts; and

(b) is licensed to transact insurance in this state.

(10) "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which this chapter applies, less return premiums thereon and dividends or unabsorbed premiums paid or credited to policyholders of such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

(11) "Person" means any individual, corporation, partnership, association or voluntary organization.

27-34-6. Creation of the fund. — There is hereby created a nonprofit unincorporated legal entity to be known as the Rhode Island insurers insolvency fund. All insurers defined as member insurers shall be and remain members of the fund as a condition of their authority to transact insurance in this state. The fund shall perform its functions under a plan of operation established and approved under section 27-34-9 and shall exercise its powers through a board of directors established under section 27-34-7. For purposes of administration and assessment, the fund shall be divided into three separate accounts: (a) the workers' compensation insurance account; (b) the automobile insurance account; and (c) the account for all other insurance to which this chapter applies.

27-34-7. Board of directors. — The board of directors of the fund shall consist of not less than five (5) nor more than nine (9) persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the commissioner. Vacancies on the board shall be filled for the remaining period of the term by a majority vote of the remaining board members subject to the approval of the commissioner. If no members are selected within sixty (60) days after July 1, 1988, the commissioner may appoint the initial members of the board of directors.

(2) In approving selections to the board, the commissioner shall consider among other things whether all member insurers are fairly represented.

(3) Members of the board of directors may be reimbursed from the assets of the fund for expenses incurred by them as members of the board of directors.

27-34-8. Powers and duties of the fund. — (1) The fund shall:

(a) be obligated to pay covered claims existing prior to the determination of the insolvency of a member insurer or arising within thirty (30) days after the determination of such insol-

vency or before the policy expiration date if less than thirty (30) days after the determination of insolvency or before the insured replaces the policy or causes its cancellation if he does so within thirty (30) days of such determination. Such obligations shall be satisfied by paying to the claimant an amount as follows:

(i) the full amount of a covered claim for benefits under a workers' compensation insurance coverage;

(ii) an amount not exceeding $10,000 per policy for a covered claim for the return of unearned premium;

(iii) an amount not exceeding $300,000 per claimant for all other covered claims.

In no event shall the fund be obligated to pay a claimant an amount in excess of the obligation of the insolvent insurer under the policy or coverage from which the claim arises. Notwithstanding any other provisions of this chapter, a covered claim shall not include any claim filed with the fund after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer. The fund shall pay only that amount of each unearned premium which is in excess of $100.

(b) be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent;

(c) allocate claims paid and expenses incurred among the three (3) accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligations of the fund under section 27-34-8(1) (a) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency and other expenses authorized by this chapter. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the calendar year preceding the assessment on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the calendar year preceding the assessment on the kinds of insur-

ance in the account. Each member insurer shall be notified of the assessment not later than thirty (30) days before it is due. No member insurer may be assessed in any one year on any account an amount greater than two per cent (2%) of that member insurer's net direct written premiums for the calendar year preceding the assessment on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the fund in any account, does not provide in any one (1) year in any account an amount sufficient to make all necessary payments from the account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become (2%) of that member insurer's net direct written premiums for the calendar year preceding the assessment on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the fund in any account, does not provide in any one (1) year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The fund shall pay claims in any order which it deems reasonable, including the payment of claims as such are received from the claimants or in groups or categories of claims. The fund may exempt or defer, in whole or in part, the assessment of any member insurer if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance; provided, however, that during the period of deferment, no dividends shall be paid to shareholders or policyholders. Deferred assessments shall be paid when such payment will not reduce capital or surplus below required minimums. Such payments shall be refunded to those companies receiving larger assessments by virtue of such deferment, or, at the election of any such company, credited against future assessments.

(d) Investigate claims brought against the fund and adjust, compromise, settle and pay covered claims to the extent of the fund's obligation and deny all other claims, and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties, to determine the extent to which such settlements, releases and judgments may be properly contested;

(e) Notify such persons as the commissioner directs under section 27-34-10 (2) (a);

(f) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the commissioner, but such designation may be declined by a member insurer; and

(g) Reimburse each servicing facility for obligations of the fund paid by the facility and for expenses incurred by the facility while handling claims on behalf of the fund and shall pay the other expenses of the fund authorized by this chapter.

(2) The fund may:

(a) employ or retain such persons as are necessary to handle claims and perform other duties of the fund;

(b) borrow funds necessary to effect the purposes of this chapter in accord with the plan of operation;

(c) sue or be sued:

(d) negotiate and become a party to such contracts as are necessary to carry out the purpose of this chapter;

(e) perform such other acts as are necessary or proper to effectuate the purpose of this chapter; and

(f) refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities, if, at the end of any calendar year, the board of directors finds that the assets of the fund in any account exceed the liabilities of that account as estimated by the board of directors for the coming year.

24-34-9. Plan of operation. — (1) (a) The fund shall submit to the commissioner a plan of operation and any

amendments thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the fund. The plan of operation and any amendments thereto shall become effective upon approval in writing by the commissioner.

(b) If the fund fails to submit a suitable plan of operation within ninety (90) days after July 1, 1988, or if at any time thereafter the fund fails to submit suitable amendments to the plan, the commissioner shall, after notice and hearing, adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this chapter. Such rules shall continue in force until modified by the commissioner or superseded by a plan or amendments thereto submitted by the fund and approved by the commissioner.

(2) All member insurers shall comply with the plan of operation.

(3) The plan of operation shall:

(a) establish the procedures whereby all the powers and duties of the fund under section 27-34-8 will be performed

(b) establish the procedures for handling assets of the fund

(c) establish the amount and method of reimbursing members of the board of directors under section 27-34-7.

(d) establish procedures by which claims may be filed with the fund and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the fund or its agent and a list of claims shall be periodically submitted to the fund or similar organization in another state by the receiver or liquidator

(e) establish regular places and times for meetings of the board of directors

(f) establish procedures for records to be kept of all financial transactions of the fund, its agents and the board of directors

(g) provide that any member insurer aggrieved by any final action or decision of the fund may appeal to the commissioner within thirty (30) days after the action or decision.

(h) establish the procedures whereby selections for the board of directors will be submitted to the commissioner

(i) contain additional provisions necessary or proper for the execution of the powers and duties of the fund

(4) The plan of operation may provide that any or all powers and duties of the fund except those under sections 27-34-8(1)(c) and 27-34-8(2)(b), may be delegated to a corporation, association or other organization which performs or will perform functions similar to those of the fund, or its equivalent, in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other functions of the fund. A delegation under this subsection shall take effect only with the approval of both the board of directors and the commissioner, and may be made only to a corporation, association or organization which extends protection not substantially less favorable and effective than that provided by this chapter.

27-34-10. Duties and powers of the commissioner. — (1) The commissioner shall:

(a) notify the fund of the existence of an insolvent insurer not later than three (3) days after he receives notice of the determination of the insolvency. The fund shall be entitled to a copy of any complaint seeking an order of liquidation with a funding of insolvency against a member insurer at the same time that such complaint is filed with a court of competent jurisdiction.

(b) upon request of the board of directors, provide the fund with a statement of the net direct written premiums of each member insurer.

(2) the commissioner may:

(a) require that the fund notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this chapter. Such notification shall be by mail at their last known address, where available, but if sufficient information for notification

by mail is not available, notice by publication in a newspaper of general circulation shall be sufficient

(b) suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation

(c) revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.

(3) Any final action or order of the commissioner under this chapter shall be subject to judicial review in a court of competent jurisdiction.

27-34-11. Effect of paid claims. — (1) Any person recovering under this chapter shall be deemed to have assigned his rights under the policy to the fund to the extent of his recovery from the fund. Every insured or claimant seeking the protection of this chapter shall cooperate with the fund to the same extent as such person would have been required to cooperate with the insolvent insurer. The fund shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer and except as provided in subsection (2) infra.

(2) The fund shall have the right to recover from the following persons the amount of any "covered claim" paid on behalf of such person pursuant to this chapter:

(a) Any insured whose net worth on December 31 of the year next preceding the date the insurer became an insolvent insurer exceeded $50,000,000 and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter; and

(b) any person who is an affiliate of the insolvent insurer and whose liability obligations to other persons are satisfied in whole or in part by payments made under this chapter.

(3) The receiver, liquidator or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the fund or a similar organization in another state.

The court having jurisdiction shall grant such claims priority equal to that which the claimant would have been entitled in the absence of this chapter against the assets of the insolvent insurer. The expenses of the fund or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(4) The fund shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the fund and estimates of anticipated claims on the fund which shall preserve the rights of the fund against the assets of the insolvent insurer.

27-34-12. Nonduplication of recovery. — (1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy.

(2) Any person having a claim or legal right of recovery under any governmental insurancr or guaranty program which is also a covered claim, shall be required to exhaust first his right under such program. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such program.

(3) Any person having a claim which may be recovered from more than one insurers' insolvency fund or its equivalent shall seek recovery first from the fund or its equivalent of the place of residence of the insured, except that if it is a first party claim for damage to property with a permanent location he shall seek recovery first from the fund or its equivalent in the state of the location of the property, and, if it is a worker's compensation claim, he shall seek recovery first from the fund or its equivalent of the state of the residence of the claimant. Any recovery under this chapter shall be reduced by the amount of recovery from any other insurance insolvency fund or its equivalent.

27-34-13. Examination of the fund. — The fund shall be subject to examination and regulation by the commissioner. The board of directors shall submit to the commissioner, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the commissioner.

27-34-14. Tax exemption. — The fund shall be exempt from payment of all fees and all taxes levied by this state or any of its subdivisions except taxes levied on real or personal property.

27-34-15. Recognition of assessments in rates. — The rates and premiums charged for insurance policies to which this chapter applies shall include amounts sufficient to recoup a sum equal to the amounts paid to the fund by the member insurer less any amounts returned to the member insurer by the fund and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer.

27-34-16. Immunity. — There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the fund or its agent or employees, the board of directors, or the commissioner or his representative for any action taken or not taken by them in the performance of their powers and duties under this chapter.

27-34-17. Stay of proceedings. — All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this state shall be stayed for six months and such additional time thereafter as may be determined by the court from the date the insolvency is determined or an ancillary proceeding is instituted in this state, whichever is later, to permit proper defense by the fund of all pending causes of action. As to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured, the fund either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict or find-

ing set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend against such claim on the merits. The liquidator, receiver, or statutory successor of an insolvent insurer covered by this chapter shall permit access by the board or its authorized representative to such of the insolvent insurer's records as are necessary for the board in carrying out its functions under this chapter with regard to covered claims. In addition, the liquidator, receiver or statutory successor shall provide the board or its representative with copies of such records upon the request by the board and at the expense of the board.

27-34-18. Termination, distribution of fund. — (a) The commissioner shall by order terminate the operation of the fund as to any kind of insurance within the scope of this chapter with respect to which he has found, after hearing, that there is in effect a statutory or voluntary plan which:

(1) is a permanent plan which is adequately funded or for which adequate funding is provided; and

(2) extends, or will extend to Rhode Island policyholders and residents protection and benefits with respect to insolvent insurers not substantially less favorable and effective to such policyholders and residents than the protection and benefits provided with respect to such kind of insurance under this chapter.

(b) The commissioner shall by the same order authorize discontinuance of future payments by insurers to the fund with respect to the same kinds of insurance; provided, that assessments and payments shall continue, as necessary, to liquidate covered claims, and related expenses, not covered by such other plan.

(c) In the event the operation of any account of the fund shall be so terminated as to all kinds of insurance otherwise within its scope, the fund as soon as possible thereafter shall distribute the balance of monies and assets remaining in said account (after discharge of the functions of the fund with respect to prior insurer insolvencies not covered by such other

plan, together with related expenses) to the insurers which are then writing in this state policies of the kinds of insurance in such account, and which had made payments into such account, pro-rata upon the basis of the aggregate of such payments made by the respective insurers to such account during the period of five (5) years next preceding the date of such order. Upon completion of such distribution with respect to all of the accounts specified in section 27-34-6, this chapter shall be deemed to have expired.

27-34-19. Prohibition against advertising of membership in fund. — No person shall make, publish or circulate, or cause to be made, published or circulated, any statement which uses the existence of the fund for the purposes of sale, solicitation or inducement to purchase any form of insurance within the scope of this chapter.

SECTION 3. This act shall take effect on July 1, 1988.

CHAPTER 408

88-H 9020

Approved Jun. 9, 1988.

☐ AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON
Executive Offices: Wakefield, Massachusetts NCCI No. 16705

WORKERS COMPENSATION AND EMPLOYERS LIABILITY POLICY INFORMATION PAGE

POLICY NO. WCD 963685-05-85-A FEIN #

M

The Insured: AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., AND AS PER SCHEDULE ATTACHED

Mailing Address: 36 FREEMAN ST PAWTUCKET PROVIDENCE RI 02861
(No. Street Town or City County State Zip Code)

☐ Individual ☐ Partnership ☒ Corporation ☐ Other

Other workplaces not shown above:
JEFFERSON BLVD., WARWICK & 50 BURNHAM AVE., CRANSTON & 83 FAIRGROUNDS RD., WEST KINGSTOWN, RI

The policy period is from 04/01/85 to 04/01/86 12:01 a.m. standard time at the address of the insured as stated herein.

A. Workers Compensation Insurance: Part One of the policy applies to the Workers Compensation Law of the states listed here:
RI (38) IL (12) GA (10) MA (20) TX (42) LA (17)

B. Employers Liability Insurance: Part Two of the policy applies to work in each state listed in Item 3A.

The limits of our liability under Part Two are:

Bodily Injury by Accident $ 100,000 each accident
Bodily Injury by Disease $ 100,000 each employee
Bodily Injury by Disease $ 500,000 policy limit

C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here: All states except NV, ND, OH, WA, WV, WY and states designated in Item 3A of the Information Page

D. This policy includes these endorsements and schedules:
SEE SCHEDULE

The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit.

Classifications		Premium Basis	Rates	
	Code No.	Estimated Total Annual Remuneration	Per $100 of Remuneration	Estimated Annual Premium
			SEE SCHEDULE	

Minimum Premium $5001-TX-924 Total Estimated Annual Premium $618,979
Indicated, interim adjustments of premium shall be made: Deposit Premium: $154,749
☐ Annually ☐ Semi-Annually ☐ Quarterly ☒ Monthly
This policy, including all endorsements issued therewith, is hereby countersigned by

Nicholas T. Morenzi
Authorized Representative

Renewal of			
Pol. Sym.	Policy Number	Yr.	Seq.
WCD	963685	05	84

Placing Office PRVDNC

POLICY IDENTIFICATION SALES STATISTICS DB 06/19/85 UNDERWRITING SALES

Co.	Policy Symbol	Policy Number	Seq.	Yr.	Name Check	Type	Cov.	Pt.	Plac Off	Solicitor Code	Kind of Audit	Assigned Serv. Office	Gov. St.	Governing Class	Exc. Code	Safety Group Number
1	WCD	9636	85	5	AMER	3	02	1	160		AC		38	3179		

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

WC 99 06 01 (4-84)

It is agreed that, with respect to any box marked by (x), the information page of the policy is changed to read:

ITEM

1 The Insured's Name:
☐ (WC 80 06 01)

Mailing Address:
☐ (WC 80 06 06) (No. Street Town or City County State Zip Code)

☐ Organization ☐ Individual ☐ Partnership ☐ Corporation ☐ Other

☐ Locations — (WC 80 06 06) ☐ ADD ☐ DELETE

2 ☐ Policy Period From (WC 80 06 03) To (WC 89 06 04)

3A ☒ States ☒ ADD SEE BELOW ☐ DELETE

3B ☐ Limits of Liability _____ each accident _____ each employee _____ policy limit

4 ☐ ADD ☐ DELETE ☐ CHANGE

☐ ☐ Exposure ☐ Experience Modification ☐ Plates ☐ Premiums ☐ Min. Premiums (WC 89 04 06)

CLASSIFICATIONS	CODE NO.	Estimated Total Annual Remuneration	Return Per $100 of Remuneration	Estimated Annual Premiums	
				Subject to Modification	All Other
ADD					
CT - 06	8742	16,500	.86		
NC - 32	8742	13,000	.34		
PA - 37	951	39,000	.91		
SALESMEN (10.)	0032				
☐ Total Unmodified Premium					
☐ Experience Modification Factor					
☐ Total Modified Premium					
☐ Total All Other Premium					
Revised Estimated Annual Premium					
Original Estimated Annual Premium					
☐ Premium Difference					

PREM. ADJ. AT AUDIT

☐ Minimum Premium to ☐ Interim adjustments of premium

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as stated above. This endorsement is attached to the policy indicated below and is effective on the date stated herein, at 12:01 A.M., standard time at the address of the insured as described in the information page.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963665-03-85-A	04/01/86	04/01/85	17
Insured to: AMERICAN INSULATED WIRE CORP., ET AL		Additional Premium	Return Premium

Issued By The Company Indicated By ☒ Below.

☒ AMERICAN MUTUAL LIABILITY INSURANCE COMPANY
☐ AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON
☐ AMERICAN POLICYHOLDERS INSURANCE COMPANY

Illegible
Secretary

Ronald J. Brewer
President

PLACING SALES: PRVDNC
KIND OF AUDIT: AC
JAM 07/16/85

Countersigned _____ Nicholas T. Morenzi
Authorized Representative

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY WC 32 03 01 (Ed. 7-84)

NORTH CAROLINA AMENDED COVERAGE ENDORSEMENT

This endorsement applies only to the insurance provided by the policy because North Carolina is shown in Item 3.A. of the Information Page.

1. Part Three (Other States Insurance) of the policy is replaced by the following:
   A. If you begin work in any state designated in the Schedule of the States below and are not insured or self-insured for such work, this policy will apply as though such states were designated in Item 3.A. of the Information Page, except:
      1. The word "states", when used in this endorsement and Schedule of States, does not include any territory of the United States of America.
      2. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.
   B. You will promptly notify us if you begin work in any such state.

Schedule of States

All states except Nevada, North Dakota, Ohio, Washington, West Virginia, Wyoming, states designated in Item 3.A. of the Information Page and_____.

2. "Part Two — Employers Liability Insurance, Section G, Limits of Liability, Subsection 2, Bodily Injury by Disease" is replaced by the following:
   G.2. Bodily Injury by Disease. The limit shown in the Schedule is the most we will pay for damages because of bodily injury by disease, including resulting death, to one or more employees arising out of work in North Carolina or in operations necessary or incidental to that work. Bodily injury by disease does not include disease that results directly from bodily injury by accident.

Schedule

Limits of Liability:

3. The Cancelation Condition of the Policy is replaced by this Condition.
   D. Cancelation
      1. You may cancel this policy. You must mail or deliver not less than 10 days advance written notice to us stating when the cancelation is to take effect.
      2. We may cancel this policy. We will mail to you, by registered mail or certified mail, not less than 10 days advance written notice stating when the cancelation is to take effect if we cancel because you fail to pay all premium when due. We will mail, by registered mail or certified mail, to you not less than 30 days advance written notice stating when the cancelation is to take effect if we cancel for any other reason. Mailing this notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to prove notice.
      3. The policy period will end on the day and hour stated in the cancelation notice.

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 04/01/85 Policy No. WCD 963685-05-85-A

Endorsement No. 19

Insured AMERICAN INSULATED WIRE CORP., ET AL Premium $

Insurance Company AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Countersigned By Nicholas T. Morenzi

WC 32 03 01
(Ed. 7-84)

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY WC 37 06 02 (Ed. 4-84)

PENNSYLVANIA NOTICE

An Insurance Company, its agents, employees, or service contractors acting on its behalf, may provide services to reduce the likelihood of injury, death or loss. These services may include any of the following or related services incident to the application for, issuance, renewal or continuation of, a policy of insurance:

1. surveys;
2. consultation or advice; or
3. inspections.

The "Insurance Consultation Services Exemption Act" of Pennsylvania provides that the Insurance Company, its agents, employees or service contractors acting on its behalf, is not liable for damages from injury, death or loss occuring as a result of any act or omission by any person in the furnishing of or the failure to furnish these services.

The Act does not apply:

1. if the injury, death or loss occurred during the actual performance of the services and was caused by the negligence of the Insurance Company, its agents, employees or service contractors;
2. to consultation services required to be performed under a written service contract not related to a policy of insurance; or
3. if any acts or omissions of the Insurance Company, its agents, employees or service contractors are judicially determined to constitute a crime, actual malice, or gross negligence.

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.
(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 04/01/85 Policy No. WCD 963685-05-85-A Endorsement No. 20
Insured AMERICAN INSULATED WIRE CORP., ET AL Premium $

Countersigned by Nicholas T. Morenzi

SCHEDULE OF NAMED INSUREDS

POLICY NO.	EXP. DATE - POL	EFF DATE - END	
WCD 963685-05-85-A	04/01/86	04/01/85	
ISSUED TO AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., AND AS PER SCHEDULE ATTACHED			

160
PRVDNC
AC

SCHEDULE OF NAMED INSUREDS

AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., INC. A/O

ACORN INSULATED WIRE CO., INC. A/O

RHODE ISLAND INSULATED WIRE CO., INC.

POLICY NO.	EXP. DATE - POL	EFF DATE - END	
WCD 963685-05-85-A	04/01/86	04/01/85	
ISSUED TO AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., AND AS PER SCHEDULE ATTACHED			

160
PRVDNC
AC

SCHEDULE OF ENDORSEMENTS

01 WC 38 06 01 STAT PROV
02 WC 00 01 06 U.S.L. & H.W.
03 WC 04 01 01 U.S.L. & H.W. [CA]
04 WC 12 06 01 AMEND CANC
05 WC 20 03 01 APPL LIM LIAB
06 3548 MA
07 WC 04 03 01 AMEND END
08 WC 00 04 03 PREM ADJ

POLICY NO.	EXP. DATE - POL	EFF DATE - END	
WCD 963685-05-85-A	04/01/86	04/01/85	

ISSUED TO
AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., AND
AS PER SCHEDULE ATTACHED

160
PRVDNC
AC

PREMIUM PAYMENT NOTICE

THE DEPOSIT PREMIUM STATED IN THE POLICY IS THE SUM TO BE PAID ON DELIVERY OF THE POLICY. PREMIUM PAYMENTS SHALL BE MADE TO THE COMPANY IN THE AMOUNT AND UPON THE DATES STATED BELOW:

DATE PAYABLE [DEPOSIT]	PREMIUM
	154,749
	(51,581 x 3 = 154,743.)
07/01/85	51,581
08/01/85	51,581
09/01/85	51,581
10/01/85	51,581
11/01/85	51,581
12/01/85	51,581
01/01/86	51,581
02/01/86	51,581
03/01/86	51,581
	51,581.00 x 12 = $618,972

POLICY NO.	GOV. ST. CD.	PLACE. OFF	TYPE DATE	PPN NO
WCD 963685-05-85-A	38	160	06/19/85	01

ISSUED TO
AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., AND
AS PER SCHEDULE ATTACHED

WORKERS COMPENSATION AND EMPLOYERS LIABILITY POLICY

Information Page Item 4 continued | Policy No. WCD 963685-05-85-A
Page No. 1

Classifications of Operations	Code No	Est. Tot. Annual Remuneration	Rates	Est. Ann'l Subj. to Exp. Mod.	Prems Not Subj.
LEVITON MFG. CO., INC.					
38-RI					
Clerical Office Employees Noc	8810	400,000	0.22	880	
Electrical Apparatus Mfg Noc	3179	19,500,000	4.48	873,600	
AMERICAN INSULATED WIRE CORP.					
38-RI					
Clerical Office Employees Noc	8810	2,500,000	0.22	5,500	
Wire Drawing - Not Iron or Steel	1924	600,000	18.08	108,480	
Wire Insulating or Covering	4470	13,900,000	5.48	761,720	
Electrical Apparatus Mfg Noc	3179	1,725,000	4.48	77,280	
Salespersons - Outside	8742	200,000	0.72	1,440	
Drivers Noc - Commercial	7380	180,000	5.35	9,630	
Per End # 12	0000	0		25	
Total Unmodified Premium				1,838,555	
Experience Modification Factor					
Inter 0910265601 Est.	9898			0,410	
Total Modified Premium	9999			753,808	
Schedule Mod	9887			800	
Total Modified Premium				603,046	
Loss Constant [5]	0032				
Expense Constant [35]	0900				35
12-IL					
Salespersons — Outside	8742	70,000	0.51	357	

WORKERS COMPENSATION AND EMPLOYERS LIABILITY POLICY

Information Page Item 4 continued | Policy No. WCD 963685-05-85-A
Page No. 1

Classifications of Operations	Code No	Est. Tot. Annual Remuner-ation	Rates	Est. Ann'l Subj. to Exp. Mod.	Prems Not Subj.
Total Unmodified Premium				357	
Experience Modification Factor					
Inter 0910265601 Est.	9898			0,410	
Total Modified Premium	9999			146	—
Loss Constant	0032				
Expense Constant [30]	0900				
10-GA					
Salespersons - Outside	8742	35,000	0.45	158	
Total Ummodified Premium				150	
Experience Modification Factor					
Inter 0910265601 Est.	9898			0,410	
Total Modified Premium	9999			65	—
Loss Constant	0032				
Expense Constant [75]	0900				40
20-MA					
Clerical Office Employees Noc	8810	75,000	0.25	188	
Storage Warehouse Noc	8292	270,000	7.69	20,763	
Cov. B Prem. $[20951] Min [50]	9845		.01	210	
Total Unmodified Premium				21,161	
Experience Modification Factor					
Inter 0910265601 Est.	9898			0,410	
Total Modified Premium	9999			8,676	—
Loss Constant [10]	0032				
Expense Constant [75]	0900				
42-TX					
Storage Warehouse Noc	8292	223,000	4.28	9,544	
Per End # 15	0993	0		10	

WORKERS COMPENSATION AND EMPLOYERS LIABILITY POLICY

Information Page Item 4 continued | Policy No. WCD 963685-05-85-A
Page No. 1

Classifications of Operations	Code No	Est. Tot. Annual Remuner-ation	Rates	Est. Ann'l Subj. to Exp. Mod.	Prems Not Subj.
Total Unmodified Premium				9,554	—
Experience Modification Factor					
Inter 0910265601 Est.	9898			0,410	
Total Modified Premium	9999			3,917	—
Loss Constant [10]	0032				
Expense Constant [60]	0900				
17-LA					
Storage Warehouse Noc	8292	120,000	5.56	6,672	
Total Ummodified Premium				6,672	
Experience modification Factor					
Inter 0910265601 Est.	9898			0,410	
Total Modified Premium	9999			2,736	—
Loss Constant [3]	0032				
Expense Constant [60]	0900				
04-CA					
Salespersons - Outside	8742	32,000	0.99	317	
Total Unmodified Premium				317	
Experience Modification Factor	9898				
Total Modified Premium	9999			317	
Loss Constant	0032				
Expense Constant [ ]	0900				
Policy Totals					
Total Unmodified Premium				1,876,774	
Total Modified Premium	9999			618,903	
Expense Constant [75]	0900				75
Total Estimated Annual Premium				618,978	

AMENDATORY ENDORSEMENT

IT IS AGREED THAT THE PROVISIONS OF FOREIGN COVERAGE ENDORSEMENT — END # 14 — DO NOT APPLY TO EMPLOYEES HIRED IN THE STATE OF TEXAS.

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as stated above.

This endorsement is attached to the policy indicated below and is effective on the date stated herein, at 12:01 A.M., standard time at the address of the insured as described in the information page.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	16
Issued to: AMERICAN INSULATED WIRE CORP., ET AL		Additional Premium	Return Premium

Issued By The Company Indicated By ☑ Below.

☑ AMERICAN MUTUAL LIABILITY INSURANCE COMPANY
☐ AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON
☐ AMERICAN POLICYHOLDERS INSURANCE COMPANY

ILLEGIBLE
Secretary

RONALD J. BREWER
President

Placing Office PRVDNC
Kind of Audit AC

Countersigned NICHOLAS T. MORENZI
Authorized Representative

Workmen's Compensation and Employers' Liability Policy

RATE CHANGE ENDORSEMENT

(United States Longshoremen's & Harbor Workers' Compensation Act)

With respect to such insurance as is afforded by the policy for benefits payable under the Longshoremen's & Harbor Workers' Compensation Act, it is agreed that the rates for the State of are increased effective
in accordance with the approval of the appropriate regulatory authority.

The new rates are shown below:

Code No.	Rate

NOT SUBJECT TO EXPERIENCE MOD. CODE 0003 10. MIN TX

The United States Longshoremen's & Harbor Workers' Coverage percentage applicable to non-"F" classes is increased to %.

Unless an additional premium is shown below premium adjustment will be made upon audit.
Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as above stated.
This endorsement is attached to the policy indicated below and is effective on the date stated herein, at 12:01 A.M., standard time at the address of the insured as described in the declarations.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	15
Issued to AMERICAN INSULATED WIRE CORP., ET AL		Additional Premium	

Issued by the company designated as the insuring company on the declarations.
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY
AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON

ILLEGIBLE
Secretary
of both

RONALD J. BREWER
President
of both

Countersigned by NICHOLAS T. MORENZI

EXECUTIVE OFFICERS, PARTNERS AND SOLE PROPRIETORS ENDORSEMENT — TEXAS

It is agreed that:

1. Such insurance as is afforded by the policy by reason of the designation of Texas in Item 3 of the information page does not apply to injury, including death resulting therefrom, sustained by any executive officer, partner or sole proprietor of the insured, except such, if any, as are designated below or in Item 4 of the Information page.

2. "Remuneration", when used as a premium basis for such insurance, shall not include the remuneration of any executive officer, partner or sole proprietor of the insured not so designated.

Designation of Persons

ALL OFFICERS

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as above stated.
This endorsement forms a part of the policy to which attached: effective as of the date shown below or at inception if no such date shown.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	14
Issued to: AMERICAN INSULATED WIRE CORP., ET AL		Additional Premium	Return Premium

Issued by the company designated as the insuring company on the information page.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY — AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON

ILLEGIBLE
Secretary of both

RONALD J. BREWER
President of Both

Countersigned NICHOLAS T. MORENZI
Authorized Representative

WC-83 2-85

A-70

FOREIGN COVERAGE ENDORSEMENT

SEE ATTACHED

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as stated above.
This endorsement is attached to the policy indicated below and is effective on the date stated herein, at 12:01 A.M., standard time at the address of the insured as described in the declarations.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	13
Issued to AMERICAN INSULATED WIRE CORP., ET AL		Additional Premium/Return Premium	

Issued by the company indicated by "X" below.

☐AMERICAN MUTUAL LIABILITY INSURANCE COMPANY ☐AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON

ILLEGIBLE
Secretary
of both

RONALD J. BREWER
President
of both

Countersigned NICHOLAS T. MORENZI
Authorized Representative

Shipping Office:

Illegible Illegible	W.C.	Man. ????	Illeg. ????	Bodily Injury	Property Damage	Medical ????	Comprehensive	Collision	????	????	Towing	
???????												
???????												
???????												

1006-1

FOREIGN COVERAGE ENDORSEMENT

IT IS AGREED THAT:

1. With respect to the operations described in item 2 of the schedule, coverage B of the policy is amended to read as follows:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or occupational disease, including death at any time resulting therefrom, sustained by any employee of the insured, who is a citizen or resident of the United States of America, arising out of and in the course of his employment by the insured in operations described in item 2 of the schedule.

2. If any employee of the insured, who is a citizen or resident of the United States of America, shall sustain injury, including death resulting therefrom, while employed by the insured in operations described in item 2 of the schedule, the company will pay on behalf of the insured an amount equal to the compensation and other benefits which would have been payable under the workmen's compensation law designated in item 3 of the schedule as applicable to the operations in which such employee was employed had the injured employee and the insured been subject to such law with respect to such employment.

3. Paragraph 2 of this endorsement does not apply to injury or death which gives rise to a valid claim under any workmen's compensation or occupational disease law of the United States of America, any state, Canada, or any province or other political subdivision thereof.

4. This endorsement does not apply to injury or death sustained in the United States of America, its territories or possessions or Canada.

5. The benefits payable under paragraph 2 of this endorsement on account of such injury shall be paid to such person or persons as would have been entitled thereto under the

A-102 designated workmen's compensation law, provided, however, that as a condition precedent to any such payment, the injured employee, or, in the event of his incapacity, his legal representative, or, in the event of his death, his legal representative or the person or persons entitled to sue therefor, shall (1) execute such full and binding release of all claims against the insured and the company on account of such injury or death as may be required by the company, and (2) assign to the company all claims or judgments or the proceeds thereof which he or they may have or recover against any person who or organization which is or may be liable on account of such injury or death and execute such other documents as the company may require to enable it to enforce such rights or collect such proceeds. The company shall have full power to enforce such rights, under any such assignment in its own name or in the name of the injured employee, or to make such negotiations and settlement as may be deemed expedient by the company, but the company shall not be obligated to enforce such rights. In the event of any recovery or settlement the company shall pay the proceeds thereof, less payments hereunder and all expenses incident to such recovery or settlement, to the person or persons entitled thereto.

6. If any person entitled to payment under paragraph 2 of this endoresement shall refuse to accept such payment and to comply with the terms and conditions set forth above or if any person shall commence any proceedings at law, in equity or in admiralty, except for such payment, seeking damages from the insured or the company on account of such injury, the company's liability under paragraph 2 of this endorsement with respect to such injury is thereupon terminated.

With respect to such insurance as is affored by the policy under coverage B as amended by paragraph 1 of this endorsement, insuring agreement 11 of the policy is amended by the addition of the following paragraph:

If claim is made or suit is brought elsewhere than within the United States of America, its territories or possessions or Canada, the company shall have the right but not the duty to investigate and settle such claims and to defend such suits. In any case in which the company elects not to investigate, settle or defend, the insured under the supervision of the company will make or cause to be made such investigation and defense as are reasonably necessary and, subject to prior authorization of the company and, within the limits of liability stated in this endorsement, will effect to the extent possible such settlement or settlements as the company shall deem proper. The company shall reimburse the insured for the reasonable costs of such investigation and defense and, within the limits of liability stated in this endorsement, for the amounts of such authorized settlements.

8. With respect to such insurance as is affored by the policy under coverage B as amended by paragraph 1 of this endorsement, condition 9 of the policy is amended to read as follows:

The words "Damages because of bodily injury by accident or occupational disease, including death at any time resulting therefrom," in coverage B include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damage obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. The limit of liability stated in item 1 of the schedule as applicable to "each employee" is the total limit of the company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by one employee in any one accident; and, subject to the foregoing provision respecting "each employee," the limit of liability stated in item 1 of the schedule as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injury by accident, including death at any time resulting there-

from, sustained by two or more employees in any one accident. The limit of liability stated in item 1 of the schedule as applicable to "each employee" is the total limit of the company's liability for all damages because of bodily injury by occupational disease, including death at any time resulting therefrom sustained by one employee; and, subject to the foregoing provision respecting each employee, the limit of liability stated in item 1 of the schedule as applicable to "aggregate disease" is the total limit of the company's liability for all damages because of bodily injury by occupational disease, including death at any time resulting therefrom, sustained by employees in operations described in item 2 of the schedule.

The limits of liabilty state herein shall not be cummulative with any limit of liability state elsewhere in the policy. The inclusion herein of more than one insued shall not operate to increase the limits of the company's liability.

SCHEDULE

1. Limits of liability	Bodily injury by accident
Each employee	100,000
Each accident	100,000

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

wc 00 05 03
(Ed. 4-84)

Retrospective Premium Endorsement Rating Option V — One Year Plan

This endorsement is added to Part Five (Premium) because you chose to have the cost of the insurance rated retrospectively by Rating Option V. This endorsement explains the rating plan and how the retrospective premium will be determined.

This endorsement applies in the states listed in the Schedule. The rating plan period is the one year period beginning with the effective date of this endorsement.

The amount of retrospective premium depends on five standard elements and two elective elements.

A. Retrospective Premium Standard Elements

The five standard elements are explained here.

1. Standard premium is the premium we would charge during the rating plan period if you have not chosen retrospective premium rating, but with two exceptions. Standard premium does not include the expense constant charge or the premium discount credit.

2. Basic premium is less than standard premium. It is standard premium multiplied by a percentage called the basic premium factor. The basic premium factor varies depending on the total amount of standard premium. The Schedule shows a range of basic premium factors for differing amounts of estimated standard premium. The actual premium factor will be determined after the standard premium is determined. If earned standard premium is not within the range of the estimated standard premiums shown in the Schedule, the basic premium will be recalculated.

3. Incurred losses are all amounts we pay or estimate

we will pay for losses, interest on judgments, expenses to recover against third parties, and employers liability loss adjustment expenses.

4. A converted loss is an incurred loss multiplied by a percentage called the loss conversion factor. The loss conversion factor is shown in the Schedule.

5. Taxes are a part of the premium we collect. Taxes are determined as a percentage of basic premium and converted losses. The percentage is called the tax multiplier. It varies by state and by Federal and non-Federal classifications. The tax multipliers are shown in the Schedule.

B. Retrospective Premium Elective Elements

Two other elements are included in retrospective premium if you elected to include them. They are the excess premium for the loss limitation, and the retrospective development premium. They are explained here.

1. The election of a loss limitation means that the amount of incurred loss to be included in the retrospective premiums is limited to an amount called the loss limitation. The loss limitation applies separately to each person who sustains bodily injury by disease and separately to all bodily injury arising out of any one accident.

The charge for this loss limitation is called the excess loss premium. Excess loss premium is a persentage of standard premium multiplied by the loss conversion factor. The percentage is called the excess loss premium factor. Taxes are added to excess loss premium just as they are for other elements of retrospective premium.

Excess loss premium factors vary by state, by classsification, and by the amount of the loss limitation. If you chose this elective element, the loss conversion factor, the loss limitation, the excess loss premium factors, and the states where they apply are shown in the Shedule.

2. The retrospective development element is used to

help stabilize premium adjustments. The premium for this element is charged with the first three calculations of retrospective premium, and is called the retrospective development premium. It is a percentage of standard premium multilplied by the loss conversion factor. The percentage of standard premium is called the retrospective development factor. Taxes are added to respective development premium just as they are for other elements of retrospective premium.

Retrospective development factors vary by state, by electing a loss limitation, and by first, second, and third calculations of retrospective premium. If you chose this elective element, the retrospective development factors are shown in the Schedule.

C. Retrospective Premium Formula

Insurance policies listed in the Schedule will be combined with this policy to calculate the retrospective premium. If the policies provide insurance for more than one insured, the retrospective premium will be determined for all insureds, not separately for each insured.

1. Retrospective premium is the sum of basic premium, converted losses, and taxes, plus the excess loss premium and retrospective development premium elective elements if you chose them.

2. The retrospective premium will not be less than the minimum nor more than the maximum retrospective premium. The minimum and maximum retrospective are determined by applying the minimum and maximum factors shown in the Schedule to the standard premium.

3. If this endorsement applies to more than one policy or state, the standard premium will be the sum of the standard premiums for each policy and state.

D. Premium Calculations and Payments

1. We will calculate the retrospective premium using all loss information we have as of a date six months after the rating plan periods ends and annually thereafter. We will have the calculation verified by the appropriate

rate service organization at your request.

We may make a special valuation of the retrospective premium as of any date that you are declared bankrupt or insolvent, make an assignment for the benefit of creditors, are involved in reorganization, receivership or liquidation, or dispose of all your interest in work covered by the insurance. You will pay the amount due us if the retrospective premium is more than the total standard premium as of the special valuation date.

2. After a calculation of retrospective premium, you and we may agree that it is the final calculation. No other calculation will be made unless there is clerical error in the final calculation.

3. After each calculation of retrospective premium, you will pay promptly the amount due us, or we will refund the amount due you. Each insured is responsible for the payment of all standard premium and retrospective premium calculated under this endorsement.

E. Work in Other States

If any of the policies provide insurance in a state not listed in the Table of States, and if you begin to work in that state during the rating plan period, this endorsement will apply to that insurance if this rating plan applies in that state on an interstate basis. The retrospective premium standard elements, and the elective elements you chose, will be determined by our manuals for that state, and added to the Schedule by endorsement.

F. Cancellation

1. If any insurance subject to this endorsement is canceled, the effective date of cancelation will become the end of the rating plan period for all insurance subject to this endorsement unless we agree with you, by endorsement, to continue the rating plan period.

2. If we cancel for nonpayment of premium, the maximum retrospective premium will be based on the standard premium for the rating plan period, increased pro rata to 365 days.

3. If you cancel, the standard premium for the rating plan period will be increased by our short rate table and procedure. This short rate premium will be the minumum retrospective premium and will be used to determine the basic premium.

The short rate premium will be used to determine the excess loss premium and retrospective development premium if you chose these selective elements.

The maximum retrospective premium will be based on the standard premium for the rating plan period, increased pro rata to 365 days.

4. Section F.3 will not apply if you cancel because:
   a. all work covered by the insurance is completed;
   b. all interest in the business covered by the insurance is sold; or,
   c. you retire from all business covered by the insurance.

WC 00 05 03

(Ed. 4-84)

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

Schedule

1. Other policies subject to this Retrospective Premium Endorsement: NONE

2. Loss limitation: $ NONE

3. Loss conversion factor: 1.15
   Minimum Retrospective Premium Factor BASIC X T.M.
   Maximum Retrospective Premium Factor 1.20

4. The basic premium factors shown here are based on estimates of standard premium. If the actual standard premium is within the range of estimated standard premiums shown here, the basic premium factor will be obtained by linear interpolation to the nearest one-tenth of 1%. If the actual standard premium is not within the range of estimated standard premiums, the basic premium factor will be recalculated.

	50%	100%	150%
Estimated standard premium:	$309,199	$618,397	$927,596
Basic premium factor: AVERAGE	.448	.389	.344

5. The tax multipliers, excess loss premium factors, and retrospective development factors, and the states where they apply, are shown in the Table of States.

TABLE OF STATES

State	Excess Loss Premium Factors		Tax Multiplier		Retrospective Development Factors		
	State (Other than "F" Classes)	Federal ("F" Classes Only)	State (Other than "F" Classes)	Federal ("F" Classes Only)	1st	2nd	3rd
RI			1.073				

WORKERS COMPENSATION EMPLOYERS LIABILITY INSURANCE POLICY WC 00 05 03 (Ed. 4-84)

BASIC PREMIUM RATIOS

	50%	100%	150%
GA	.387	.331	.301
IL	.298	.253	.222
LA	.458	.401	.356
MA	.354	.284	.229
RI	.450	.391	.347
TX	.337	.277	.232
AUG.	.448	.389	.344

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective Policy No. Endorsement No. 10

Insured Premium $

Countersigned By NICHOLAS T. MORENZI

TX-3.2
(9-1-73)

EXECUTIVE OFFICERS, PARTNERS AND SOLE PROPRIETORS ENDORSEMENT — TEXAS

It is agreed that:

1. Such insurance as is afforded by the policy by reason of the designation of Texas in Item 3 of the information page does not apply to injury, including death resulting therefrom, sustained by any executive officer, partner or sole proprietor of the insured, except such, if any, as are designated below or in Item 4 of the information page.

2. "Remuneration", when used as a premium basis for such insurance, shall not include the remuneration of any executive officer, partner or sole proprietor of the insured not so designated.

Designation of Persons

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as above stated.
This endorsement forms a part of the policy to which attached; effective as of the date shown below or at inception if no such date shown.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	9
Issued to AMERICAN INSULATED WIRE CORP., ET AL		Additional Premium	Return Premium

Issued by the company designated as the insuring company on the information page.
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON

ILLEGIBLE
Secretary of both

RONALD J. BREWER
President of both

Countersigned NICHOLAS T. MORENZI
Authorized Representative

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY WC 00 04 03 (Ed. 4-84)

EXPERIENCE RATING MODIFICATION FACTOR ENDORSEMENT

The premium for the policy will be adjusted by an experience rating modification factor. The factor was not available when the policy was issued. The factor, if any, shown on the Information Page is an estimate. We will issue an endorsement to show the proper factor, if different from the factor shown, when it is calculated.

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective Policy No. Endorsement No. 8

Insured Premium $

Insurance Company AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Countersigned By NICHOLAS T. MORENZI

WC 00 04 03
(Ed. 4-84)

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WORKERS COMPENSATION & EMPLOYERS LIABILITY POLICY — **WC 04 03 01 (4-84)**

POLICY AMENDATORY ENDORSEMENT — CALIFORNIA

It is agreed that, anything in the policy to the contrary notwithstanding, such insurance as is afforded by this policy by reason of the designation of California in Item 3 of the information page is subject to the following provisions:

1. **Minors Illegally Employed — Not Insured.** This policy does not cover liability for additional compensation imposed on you under Section 4557, Division IV, Labor Code of the State of California, by reason of injury to an employee under sixteen years of age and illegally employed at the time of injury.
2. **Punitive or Exemplary Damages — Uninsurable.** This policy does not cover punitive or exemplary damages where insurance of liability therefor is prohibited by law or contrary to public policy.
3. **Application of Policy.** Part One, "Workers' Compensation Insurance", A. "How This Insurance Applies", is amended to read as follows:
   This workers' compensation insurance applies to bodily injury by accident or disease, including death resulting therefrom. Bodily injury by accident must occur during the policy period. Bodily injury by disease must be caused or aggravated by the conditions of your employment. Your employee's exposure to those conditions causing or aggravating such bodily injury by disease must occur during the policy period.
4. **Rate Changes.** This policy is issued by us and accepted by you with the agreement that you will accept any increase in premium or in the rates of premium which may be promulgated under any rating plan approved by the Insurance Commissioner of the State of California, and that the effective date of any such increase shall be the effective date thereof fixed in accordance with the provisions of any such rating plan so approved by the Insurance Commissioner. Also the rates used to determine the premium are subject to increase during the term of the policy if an increase in rates applicable to policies in force is approved by the Insurance Commissioner of the State of California, and that the effective date of any such increase shall be the date fixed by the Insurance Commissioner.
5. **Long Term Policy.** If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve month period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy has been written for each consecutive period.
6. **Statutory Provision.** Your employee has a first lien upon any amount which becomes owing to you by us on account of this policy, and in the case of your legal incapacity or inability to receive the money and pay it to the claimant, we will pay it directly to the claimant.

It is further agreed that this policy, including all endorsements forming a part thereof, constitutes the entire contract of insurance. No condition, provision, agreement, or understanding not set forth in this policy or such endorsements shall affect such contract or any rights, duties, or privileges arising therefrom.

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as above stated.

This endorsement forms a part of the policy to which attached: effective as of the date shown below or at inception if no such date shown.

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	7

Issued to	Additional Premium	Return Premium
AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., ET AL		

Issued by the company designated as the insuring company on the information page.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY — AMERICAM MUTUAL INSURANCE COMPANY OF BOSTON

ILLEGIBLE
Secretary of both

RONALD J. BREWER
President of both

Countersigned NICHOLAS T. MORENZI
Authorized Representative

This endorsement issued by the Company indicated by "X" below:

☒ AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

☐ AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON

MASSACHUSETTS ENDORSEMENT

As required by Section 80 of Chapter 175 of the General Laws of Massachusetts, notice is hereby given that the risk insured by this policy is classified for the purpose of fixing and determining the percentage of dividend or expiration return of premium to be paid on expiring or cancelled policies in the classification(s) hereafter designated by "X" below:

- ☐ (a) Vessels, crafts and boats
- ☐ (b) Motor Vehicle Liability coverages as defined in Section 34 of Chapter 90
- ☐ (c) Other Automobile Liability coverages
- ☐ (d) Automobile Physical Damage coverages
- ☐ (e) Accident and Health
- ☐ (f) Inland Marine other than Motor Vehicles, Crafts or Boats
- ☐ (g) Homeowners
- ☐ (h) Commercial Multiple Peril
- ☒ (i) 1. (American Mutual Liability Insurance Company Only) Workers' Compensation except such policies subject to the Company's Loss Ratio, Safety Group and retention Dividend Plans.
- ☐ 2. (American Mutual Insurance Company of Boston Only) Workers' Compensation except such policies subject to the Company's Safety Group and Loss Ratio Dividend Plans
- ☐ (j) Liability Other than Auto, Professional and Aviation Liability policies
- ☐ (k) Fire, Extended Coverage and Allied Lines
- ☐ (l) All Other

Nothing herein contained shall be held to waive, vary, alter or extend any condition or provision of the policy other than as above stated.

ILLEGIBLE
Secretary of both

RONALD J. BREWER
President of Both

Policy No.	Expiration Date of Policy	Effective Date of Endorsement	Endorsement No.
WCD 963685-05-85-A	04/01/86	04/01/85	6
Issued to: AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., INC. ET AL			

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

WC 20 03 01
(Ed. 4-84)

Massachusetts Limits of Liability Endorsement

This endorsement applies only to the insurance provided in Part Two (Employers Liability Insurance) because Massachusetts is listed in item 3.A. of the Information Page.

Our liability to you under Section 25 of Chapter 152 of the General Laws of Massachusetts is not subject to the limit of liability that applies to Part Two (Employers Liability Insurance).

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective Policy No. Endorsement No. 5

Insured Premium $

WC 20 0301
(Ed. 4-84)

Countersigned by Nicholas T. Morenzi

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

WC 12 06 01
(Ed. 4-84)

Illinois Amendatory Endorsement

This endorsement applies only to the insurance provided by the policy because Illionis is shown in item 3.A. of the Information Page.

Part Six (Conditions), Condition A. Inspection, Condition D. Cancelation and Condition E. Sole Representative of the policy are replaced by these four Conditions.

Inspection

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. The National Council on Compensation Insurance has the same rights we have under this provision.

Cancelation

1. You may cancel this policy. You will mail or deliver advance written notice to us, stating when the cancelation is to take effect.

2. We may cancel this policy. We will mail to each named insured and to the broker or the agent of record advance written notice stating when the cancelation is to take effect. If we cancel because you do not pay all premium when due, we will mail the notice of cancelation at least ten days before the cancelation is to take effect. If we cancel for any other reason, we will mail the notice:

a. at least 15 days before the cancelation is to take effect if the policy has been in force for 180 days or less;
b. at least 30 days before the cancelation is to take effect if the policy has been in force more than 180 days.

3. Our notice of cancelation will state our reasons for canceling.
4. Mailing notice to you at your last known mailing address will be sufficient to prove notice.
5. The policy period will end on the day and hour stated in the cancelation notice.

NONRENEWAL

1. We may elect not to renew the policy. We will mail to each named insured and to the broker or the agent of record not less than 30 days advance notice stating when the nonrenewal will take effect. Mailing that notice to you at your mailing address last known to us will be sufficient to prove notice.

2. Our notice of nonrenewal will state our reasons for not renewing.

3. If we fail to provide the notice of nonrenewal as required, the policy will still terminate on its expiration date if:

a. we show you our willingness to renew the policy;
b. you notify us or the agent or broker who procured this policy that you do not want the policy renewed;
c. you fail to pay all premiums when due; or
d. you obtain other insurance as a replacement of the policy.

SOLE REPRESENTATIVE

The insured first named in item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium or to give us notice of cancelation.

Part Five (Premium), Section G Audit is replaced by this section

Audit

You will let us examine and audit all your records that related to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy ends. Information developed by audit will be used to determine final premium. The National Council on Compensation Insurance has the same rights we have under this provision.

This endorsement changes the policy to which it is attached and is effective on the date unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective Policy No. Endorsement No. 4

Insured Premium $

WC 12 06 01 (Ed. 4-84) Countersigned by Nicholas T. Morenzi

WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

Longshoremen's and Harbor Workers' Compensation Act Coverage Endorsement-California

This endorsement applies only to work subject to the Longshoremen's and Harbor Workers' Compensation Act in California. The policy applies to that work as though California were listed in item 3.A of the Information Page.

The definition of workers compensation law includes the Longshoremen's and Harbor Workers' Compensation Act (33 USC Sections 901-950) and any amendment to that Act that is in effect during the policy period.

This endorsement does not apply to work subject to the Defense Base Act, the Outer Continental Shelf Lands Act, or the Nonappropriated Fund Instrumentalities Act.

The estimated premium for the Longshoremen's and Harbor Workers' Compensation Act coverage provided by this endorsement is as shown in the Schedule below or item 4 of the Information Page.

Schedule

Code No.	Classification	Estimated Annual Remuneration	Rate Per $100 of Remuneration	Estimated Annual Premium

Total Estimated Annual Premium

This endorsement changes the policy to which it is attached and is effective on the date unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective 04/01/85 Policy No. WCD 963685-05-85-A Endorsement No. 3

Insured AMERICAN INSULATED WIRE CORP., LEVITON MFG. CO., INC. ETAL
Insurance Company AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Countersigned by Nicholas T. Morenzi

WC 04 01 01

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT COVERAGE ENDORSEMENT

This endorsement applies only to work subject to the Longshoremen's and Harbor Workers' Compensation Act in a state shown in the Schedule. The policy applies to that work as though that state were listed in item 3.A. of the Information Page.

The definition of workers compensation law includes the Longshoremen's and Harbor Workers' Compensation Act (33 USC Sections 901-950) and any amendment to that Act that is in effect during the policy period.

This endorsement does not apply to work subject to the Defense Base Act, the Outer Continental Shelf Lands Act, or the Nonappropriated Fund Instrumentalities Act.

SCHEDULE

State	Longshoremen's and Harbor Workers' Compensation Act Coverage Percentage

The rates for classification with code numbers not followed by the letter "F" are rates for work not ordinarily subject to the Longshoremen's and Harbor Workers' Compensation Act. If this policy covers work under such classifications, and if the work is subject to the Longshoremen's and Harbor Workers' Compensation Act coverage Percentage shown in the Schedule.

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective Policy No. Endorsement No. 2

Insured

Insurance Company AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Countersigned by Nicholas T. Morenzi

WC 00 01 06
(Ed. 10-84)

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WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

WC 00 00 00
(Ed. 4-84)

In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.

GENERAL SECTION

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

B. Who is insured

You are insured if you are an employer named in item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period. It does not include the provisons of any law that provide nonoccupational disability benefits.

D. State

State means any state of the United States of America, and the District of Columbia.

E. Locations

This policy covers all of your workplaces listed in items 1 or 4 of the Information Page; and it covers all other workplaces in item 3.A. states unless you have other insurance or are self-insured for such workplaces.

PART ONE — WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.
2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

C. We Will Defend

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

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E. Other Insurance

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits provided by the workers compensation law on your behalf, you will reimburse us promptly.

G. Recovery From Others

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. Statutory Provisions

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are both in conflict with that law.
5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into secutiry or other special funds, and assessments payable by us under the law.
6. Terms of this insurance that conflict with the workers compensation law are charged by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

PART TWO — EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the policy period.
4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.
5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. We Will Pay

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against third party as a result of injury to your employee;
2. for care and loss of service; and
3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. beacuse of bodily injury to your employee that arises out of and in the course of employment claimed against you in a capacity other than as employer.

C. Exclusions

This insurance does not cover:

1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;
2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;
3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;
4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;
5. bodily injury intentionally caused or aggravated by you;
6. bodily injury occuring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who

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is temporarily outside these countries;

7. damages arising out of the discharge or coercion of, or discrimination against any employee in violation of law.

D. We Will Defend

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend;

1. reasonable expenses incurred at our request; but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

F. Other Insurance

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. Limits of Liability

Our liability to pay for damages is limited. Our limits of liability are shown in item 3.B. of the Information Page. They apply as explained below.

1. Bodily Injury by Accident. The limit shown for "bodily injury by accident-each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident. A disease is not bodily injury by accident unless it results directly from bodily injury by accident.
2. Bodily Injury by Disease. The limit shown for "bodily injury by disease-policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease-each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

   Bodily injury by disease does not include disease that results directly from a bodily injury by accident.
3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. Recovery From Others

We have your rights to recover from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. Actions Against Us

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this policy; and
2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability.

PART THREE — OTHER STATES INSURANCE

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
2. If you begin work in any one of those states and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benfits directly to persons entitled to them.

B. Notice

Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

PART FOUR — YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE — PREMIUM

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will asssign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and
2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less that the highest minimum premium for the classifications covered by this policy.

If this policy is cancelled, final premium will be determined in the following way unless our manuals provide otherwise.

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate calculation table and procedure. Final premium will not be less than the minimum premium.

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX — CONDITIONS

A. Inspection

We have the right, but are not obliged to inspect your workplace at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

B. Long Term Policy

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.

C. Tansfer of Your Rights and Duties

Your rights or duties under this policy may not be transferred without our written consent.

If you die and we receive notice within thirty days after your death, we will cover your legal representative as insured.

D. Cancelation

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancelation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancelation is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancelation notice.
4. Any of these provisions that conflicts with a law that controls the cancelation of the insurance in this policy

is changed by this statement to comply with that law.

E. Sole Representative

The insured first named in item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancelation.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

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v.

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RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Rhode Island Insurers' Insolvency Fund (the "Fund") commenced this action to recover workers' compensation benefits paid by the Fund to employees of petitioner Leviton Manufacturing Company, Inc. ("Petitioner") and petitioner's subsidiary, American Insulated Wire Corporation. These payments were made by the Fund pursuant to the Rhode Island Insurers' Insolvency Fund Act (the "Act" or the "1988 Act"), R.I. Gen. Laws § 27-34-1, *et seq.*

Under the net worth recoupment provision set forth in section § 27-34-11(b)(1) of the Act (the "recoupment provision"), any insured with a net worth in excess of $50 million is required to reimburse the Fund for all "covered claims" paid by the Fund on behalf of such insured. Petitioner has a net worth

in excess of $50 million. Despite the plain language of the Act, however, petitioner has refused to reimburse the Fund for "covered claims" paid on petitioner's behalf.

The Fund was established in 1988 with the passage of the Act. 1988 R.I. Pub. Laws ch. 407. *See* R.I. Gen. Laws § 27-34-6. The 1988 Act repealed the insolvency fund act originally enacted in 1970. 1970 R.I. Pub. Laws ch. 166 (the "1970 Act"). The purpose of the Fund is to:

> provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, and to create an entity to assess the cost of such protection and distribute it equitably among member insurers.

R.I. Gen. Laws § 27-34-2. The Act was patterned after model legislation drafted by the National Association of Insurance Commissioners (the "Model Act"). At present, the Model Act has been adopted, with varying modifications, in 49 states.

In general, when an insurer writing insurance in Rhode Island is declared insolvent, the Fund becomes obligated to pay "covered claims" of Rhode Island claimants and insureds which are defined as claims arising out of policies issued by an insolvent insurer. R.I. Gen. Laws § 27-34-8(1). The Fund does not levy assessments to create a fund for future insolvencies. Rather, the Fund operates on a post insolvency assessment basis. After an insolvency occurs the Fund obtains the funds it requires for such insolvency by assessing the Fund's member insurers, R.I. Gen. Laws § 27-34-8(a)(3), who are required to be members of the Fund as a condition of transacting insurance in Rhode Island. R.I. Gen. Laws § 27-34-6. Such insurers, in turn, recoup Fund assessments by passing the cost on to persons who purchase the types of insurance covered by the Fund, in the form of higher rates and premiums. R.I. Gen. Laws § 27-34-15.

The Fund is not the successor of the insolvent insurer. The

successor of the insolvent insurer is the receiver appointed by the court having jurisdiction over the liquidation of the insolvent insurer, generally a court of the insurer's state of domicile. Here, the receiver of petitioner's insolvent insurer is the Commissioner of Insurance of the Commonwealth of Massachusetts. The receiver succeeds to the assets and liabilities of the insolvent insurer and liquidates the insolvent insurer's estate subject to supervision by the appointing court. *See* Mass. Gen. Laws ch. 175, § 180C.

As part of the Act creating the Fund, the Rhode Island legislature included a provision which permits the Fund to recoup from insureds having a net worth greater than $50 million, amounts paid by the Fund on behalf of such insureds. The legislature's recoupment provision was not novel. Of the 49 states having guaranty funds based on the Model Act, seven states[1] have enacted provisions which prohibit guaranty fund coverage for claims against insureds with a net worth greater than a prescribed amount (a "direct prohibition" approach), and eighteen states (including Rhode Island)[2] require the guaranty fund to pay claims and then recoup from the high net worth insured the amount paid (a "recoupment" approach). In either event, in the twenty-five states having

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[1] *See* Arkansas Code Ann. § 23-90-103(2); Colorado Rev. Stat. § 10-4-504; Georgia Code Ann. § 33-36-3(F); Indiana Code § 27-6-8-4(4); Maryland Code Ann., Insurance, § 9-301(d)(2); Michigan Comp. Laws § 500.7025(3); Missouri Rev. Stat. § 375.772(2).

[2] *See* Connecticut Gen. Stat. § 38a-844(4); Delaware Code Ann. tit. 18, § 4211(a)(2); D.C. Code Ann. § 35-3908(b); Hawaii Rev. Stat. § 431:16-111(b)(1); 215 Illinois Comp. Stat. 5/545; Kentucky Rev. Stat. Ann. § 304.36-050(B)(5); Minn. Stat. § 60C.09; Montana Code Ann. § 33-10-114(2); North Carolina Gen. Stat. § 58-48-50(a); Ohio Rev. Code Ann. § 3955.12(B)(1); Oklahoma Stat. tit. 36 § 2010(B)(1); Pennsylvania Stat. Ann. tit. 40, § 991.1816; Rhode Island Gen. Laws, § 27-34-11(b)(1); South Dakota Codified Laws § 58-29A-19.1; Texas Ins. Code Ann. art. 21.28-C; Utah Code Ann. § 31-A-28-207(3)(b); Virginia Code Ann. § 38.2-1609(A)(2); Wisconsin Stat. § 646.31. Certain of these jurisdictions also prohibit guaranty fund coverage for high net worth insureds. *See, e.g.*, 215 Illinois Comp. Stat. 5/543.3(b)(iv).

a net worth provision the high net worth insured is ultimately responsible for payment of such claims.[3]

The recoupment provision contained in section 27-34-11(b)(1) of the Act operates as follows: Where the insured has a net worth of more than $50 million on December 31 of the year next preceding the insurer's insolvency, that insured is required to reimburse the Fund for covered claims paid by the Fund on the insured's behalf.

Petitioner's worker's compensation insurance carrier prior to 1986 was American Mutual Liability Insurance Company ("American Mutual"). At all relevant times, American Mutual was a Massachusetts insurer licensed to transact insurance in Rhode Island. On March 9, 1989, the Massachusetts Supreme Judicial Court for Suffolk County determined that American Mutual was insolvent and ordered American Mutual liquidated. Following the court's determination of American Mutual's insolvency, the Fund became obligated to pay "covered claims" of Rhode Island insureds and claimants arising under American Mutual policies. Included among those obligations were "covered claims" arising under workers compensation policies issued to petitioner. As of June 30, 1995, the Fund had paid over $1.5 million to petitioner's employees.

On December 31, 1988 (the year next preceding American Mutual's insolvency), petitioner had a net worth of more than $50 million. The payments made by the Fund to petitioner's employees satisfied petitioner's liability obligations to those employees. Thus, under the Act, the Fund is entitled to be reimbursed by petitioner. R.I. Gen. Laws § 27-34-11(b)(1).

In its answer to the Fund's complaint, petitioner raised the following affirmative defenses based on the Constitutions of the United States and Rhode Island: (1) equal protection; (2) violation of due process (retroactivity); (3) impairment of contract; and (4) taking without just compensation. The Fund

[3] The Wisconsin Insurance Security Fund Act, § 646.31(12) restricts the amount a high net worth insured may recover from the security fund.

moved for partial summary judgment or, in the alternative, to strike petitioner's constitutional defenses. The trial court granted the Fund's motion for partial summary judgment and held that the recoupment provision of the Act satisfies the requirements of the Due Process, Equal Protection, Takings and Contract Clauses of the United States Constitution and the parallel clauses of the Rhode Island Constitution. *Rhode Island Insurers' Insolvency Fund* v. *Leviton Mfg. Co.*, No. 95-2505, 1996 WL 936930, at *7 (R.I. Super. May 16, 1996), *aff'd*, 716 A.2d 730 (R.I. 1998).

Petitioner appealed to the Rhode Island Supreme Court, but did not appeal the trial court's decision upholding the constitutionality of the recoupment provision under the Takings Clause. *Rhode Island Insurers' Insolvency Fund* v. *Leviton Mfg. Co.*, 716 A.2d 730, 733 n.3 (R.I. 1998). Therefore, the Rhode Island Supreme Court noted that petitioner had waived its defense under the Takings Clause. *Id.* The Rhode Island Supreme Court affirmed the trial court's decision. *Id.* at 737. By its Petition for a Writ of Certiorari, petitioner now seeks review of the Rhode Island Supreme Court's decision under the Due Process Clause and Contract Clause of the United States Constitution. Petitioner does not challenge the Rhode Island Supreme Court's rejection of petitioner's Equal Protection Clause defense.

REASONS FOR DENYING THE PETITION

The petition should be denied because the decision by the Rhode Island Supreme Court is fully consistent with the decisions of this Court and of other courts of appeal, and the petition does not present any issue warranting review.

The Rhode Island Supreme Court correctly decided that the recoupment provision of the Act did not apply retroactively. The court properly determined that the Fund's right of reimbursement under the recoupment provision was triggered by events which occurred *after* the enactment of the Act in 1988, including the insolvency of American Mutual in 1989 and the

Fund's payment of workers' compensation claims on petitioner's behalf following the insolvency of American Mutual. Even assuming *arguendo* that the recoupment provision operates retroactively, any retroactive operation is rationally related to legitimate public purposes and does not deny due process.

The Rhode Island Supreme Court's decision did not "disrupt settled principles of constitutional interpretation" enunciated by the Court in *Eastern Enterprises* v. *Apfel*, __ U.S. __, 118 S. Ct. 2131 (1998). Petition ("Pet.") 7. In *Apfel*, a plurality of justices ruled that the Coal Industry Retiree Health Benefit Act ("Coal Act") improperly placed "a severe, disproportionate, and extremely retroactive burden" on the petitioner in *Apfel* in violation of the Takings Clause. *Apfel*, 118 S. Ct. at 2153. As explained below, the recoupment provision of the Act does not impose a severe, disproportionate or extremely retroactive burden on petitioner. This case is further distinguished from *Apfel* in that this case does not present "the most egregious circumstances" or "one of the rare instances where the Legislature has exceeded the limits imposed by due process." *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring).

Finally, petitioner's contention that the Rhode Island Supreme Court's decision "disrupts settled principles of constitutional interpretation" of the Contract Clause is mistaken. Pet. 7. The Rhode Island Supreme Court correctly applied the Court's test set forth in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704 (1983) and in doing so properly determined that the recoupment provision does not impair a contractual relationship. Even assuming *arguendo* that the recoupment provision did impair a contractual relationship, the provision does not violate the Contract Clause because it serves a legitimate public purpose and any adjustment of the parties' rights and responsibilities is reasonable and appropriate.

I. THE RHODE ISLAND SUPREME COURT'S DECISION THAT THE ACT COMPORTS WITH THE DUE PROCESS CLAUSE SHOULD NOT BE DISTURBED.

To demonstrate that the Act violates the requirements of due process, petitioner must traverse "unusually inhospitable legal terrain." *In re Chateaugay Corp.*, 53 F.3d 478, 487 (2d Cir.), *cert. denied*, 516 U.S. 913, 116 S. Ct. 298 (1995). Economic legislation such as the 1988 Act is entitled to a considerable presumption of constitutionality and will be upheld unless it is established that the legislature acted in an arbitrary or irrational way. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976). Given this standard of review that is among the most deferential in constitutional jurisprudence, "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances." *Apfel*, 118 S. Ct. at 2159 (Kennedy, J., concurring). Even when a statute has a retroactive effect, the Due Process Clause is satisfied as long as "the retroactive application of the legislation is itself justified by rational legislative purpose." *Pension Benefit Guar. Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984).

In determining whether the Rhode Island legislature acted in an arbitrary and irrational way in enacting the recoupment provision, the Court looks only to determine whether the legislation is "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp.*, 467 U.S. at 729, 104 S. Ct. at 2717-18. Economic legislation will be sustained so long as any conceivable rational basis exists for the statute under review, regardless of whether the legislature articulated or even considered the rationale. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"). In enacting economic legislation, the legislature "had absolutely no obligation to select the scheme that a court later would find to be

the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477, 105 S. Ct. 1441, 1458 (1985). The Rhode Island Supreme Court properly decided that the recoupment provision does not violate the Due Process Clause. The court decided that the recoupment provision does not apply retroactively as applied to petitioner. The court also noted that the recoupment provision was "reasonable and rationally related" to the public purpose underlying the Act, namely, "to preserve the limited resources of the fund by requiring insureds with a net worth in excess of $50 million to reimburse the fund for all payments made in the course of discharging the insured's liability." *Leviton*, 716 A.2d at 734. The Rhode Island Supreme Court's decision that the recoupment provision satisfies the requirements of due process was correct and does not warrant further review.

A. *The Rhode Island Supreme Court Correctly Decided That The Recoupment Provision Of The Act Does Not Apply Retroactively.*

In deciding that the recoupment provision does not operate retroactively, the Rhode Island Supreme Court relied in part on *McAndrews* v. *Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993). The Rhode Island Supreme Court's reliance on *McAndrews* was correct.

In *McAndrews*, the First Circuit Court of Appeals held that a Federal statute (FIRREA) which permits the FDIC to enforce contracts previously entered into by failed banks, rendered unenforceable a termination-upon-insolvency clause contained in a lease entered into between the lessor and the bank prior to the enactment of FIRREA. *McAndrews*, 989 F.2d at 16. The court ruled that the FIRREA statute did not operate retroactively even though the lease was entered into prior to the enactment of the FIRREA statute. *Id.* The court ruled that the events triggering the statute's invalidation of the termination-upon-insolvency clause occurred *after* the

enactment of FIRREA. *Id.* FIRREA was only "brought into play through a collocation of circumstances, all occurring well after the law's effective date." *Id.* These circumstances were the FDIC's appointment as receiver and the lessor's attempt to invoke the termination-upon-insolvency clause. *Id.* Thus, the statute was operating prospectively even though it modified the legal effect of a preexisting relationship between the lessor and lessee. *Id.*

Relying on *McAndrews*, the Rhode Island Supreme Court correctly determined that the recoupment provision, as applied to petitioner, does not operate retroactively because the events triggering the recoupment provision occurred after the enactment of the provision. *Leviton*, 716 A.2d at 735. Petitioner does not challenge *McAndrews*. Rather, petitioner argues that the Rhode Island Supreme Court "wrongly applied the trigger theory expressed in *McAndrews.*" Pet. 12. Petitioner attempts to distinguish *McAndrews* on the basis that all of the facts which triggered the application of the statute at issue in *McAndrews* occurred after the statute had been enacted. The facts of this case fit squarely within *McAndrews*. The Rhode Island Supreme Court determined that all of the facts which triggered the Fund's right to reimbursement under the recoupment provision occurred after the enactment of the recoupment provision in 1988, including the insolvency of American Mutual in 1989, the 1989 triggering of the Fund's obligations to pay claims arising under American Mutual policies, and the Fund's actual payment of claims giving rise to petitioner's obligation to reimburse the Fund. *Leviton*, 716 A.2d at 735-36. The Rhode Island Supreme Court's decision is consistent with *McAndrews*.

Petitioner also attempts to distinguish *McAndrews* on the basis that not all of the circumstances affecting petitioner's rights occurred after the enactment of the recoupment provision in 1988, pointing to petitioner's incurring of liability for workers' compensation benefits covered by the pre-1988 American Mutual policies. Pet. 12. The fact that certain circumstances affecting petitioner's rights occurred prior to 1988

does not distinguish this case from *McAndrews*. In *McAndrews*, the lease which contained the termination-upon-insolvency clause was entered into prior to the enactment of the FIRREA statute invalidating such clause. The fact that work-related injuries occurred before the enactment of the Act in 1988 is not controlling because "a statute does not operate retroactively simply because its application requires some reference to antecedent facts." *McAndrews*, 989 F.2d at 16. Further, as noted by the Rhode Island Supreme Court, "[t]he fact that the work-related injuries giving rise to these [workers' compensation] claims occurred prior to the effective date of the act is not controlling since the fund was not obligated to pay these claims." *Leviton*, 716 A.2d at 735.

Contrary to petitioner's assertion, the Rhode Island Supreme Court's decision is consistent with such court's decision in *Liberty Mutual Ins. Co.* v. *Rhode Island Insurers' Insolvency Fund*, 675 A.2d 417 (R.I. 1996). In *Liberty Mutual*, the court held that the legislature intended that the 1988 Act apply to insolvencies occurring after the enactment of the 1988 Act even though the injury covered by the Fund occurred prior to such enactment. The court noted that a "covered claim" is defined by the 1988 Act as "an unpaid claim . . . which arises out of and is within the coverage and subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer becomes an insolvent insurer on or after July 1, 1988." *Liberty Mutual*, 675 A.2d at 418. The Rhode Island Supreme Court's opinion in *Liberty Mutual* is consistent with its decision in this action. Furthermore, petitioner's suggestion that the Rhode Island Supreme Court misapplied its own ruling in *Liberty Mutual* is not one of the "compelling reasons" identified in Rule 10 as grounds for review by this Court.

B. *Petitioner's Reliance On Eastern Enterprises v. Apfel Is Entirely Mistaken.*

Petitioner attempts to apply the "principles enunciated" in *Eastern Enterprises* v. *Apfel*, __ U.S. __, 118 S. Ct. 2131

(1998) in support of petitioner's assertion that the recoupment provision violates the Due Process Clause. Pet. 8-11. In *Apfel*, the plurality held that the Coal Industry Retiree Health Benefit Act (the "Coal Act") violated the Takings Clause because the Coal Act imposed a "severe, disproportionate and extremely retroactive burden" upon Eastern Enterprises ("Eastern") by requiring Eastern to fund lifetime health benefits for coal workers where Eastern had never agreed to fund such benefits. *Apfel*, 118 S. Ct. at 2153.[4] As set forth below, this case, unlike *Apfel*, does not present one of the "rare instances" or "the most egregious of circumstances" where a legislature has targeted an unpopular group for retribution or imposed a severe, disproportionate and extremely retroactive liability in violation of petitioner's due process rights. *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring).

First, petitioner's suggestion that petitioner has been unfairly "targeted" by the recoupment provision of the Act is completely mistaken. In his concurring opinion, Justice Kennedy warned that groups "targeted by retroactive laws, were they to be denied all [due process] protection, would have a justified fear that a government once formed to protect expectations can now destroy them." *Apfel*, 118 S. Ct. at 2159. Likening itself to the targeted former coal employer in *Apfel*, petitioner contends that petitioner is "one of the few companies in Rhode Island that has been subject to the 1988 Act's recoupment provision and can easily be characterized as one of a group 'targeted by retroactive laws.'" Pet. 11 (citing *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring)). Petitioner's assertion is not supported by the record. The recoupment provision applies to all insureds having the requi-

[4] Petitioner does not and cannot rely on the plurality's Takings Clause analysis in *Apfel* because petitioner waived its Takings Clause defense in this case. *Leviton*, 716 A.2d at 733 n.3. Nonetheless, petitioner seeks to apply the "principles or retroactivity" underlying the plurality opinion. Petitioner also relies specifically on Justice Kennedy's concurring opinion, wherein Justice Kennedy advocated using the Due Process Clause to invalidate the Coal Act. *Apfel*, 118 S. Ct. at 2153.

site net worth for all insolvencies occurring after 1988. A number of other high net worth insureds in Rhode Island, including the Roman Catholic Archdiocese of Providence, Brown University and Citizens Bank have all reimbursed the Fund under the recoupment provision of the 1988 Act. App. p. A-1,2 ¶¶4-6. Moreover, in arguing that it has been unfairly targeted by the recoupment provision in Rhode Island, petitioner fails to acknowledge that twenty-four other states have enacted a form of the net worth provision. *See* notes 1-2, *supra*. No one has suggested that such net worth provisions were enacted by such state legislatures "as a means of retribution against unpopular groups or individuals." *Apfel*, 118 S. Ct. at 2159. Rather, such net worth provisions "preserve the limited resources of the fund by requiring [high net worth] insureds . . . to reimburse the fund for all payments made in discharging the insured's liability." *Leviton*, 716 A.2d at 734.

Petitioner's assertion that it has been unfairly targeted by the recoupment provision also fails because there is nothing to suggest that the Rhode Island Legislature enacted the recoupment provision "with an exact knowledge" of who would be subjected to the statute. *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring) (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960). When the Rhode Island legislature enacted the recoupment provision in 1988, it could not have anticipated that American Mutual would be determined to be insolvent by a Massachusetts court in March of 1989, nor could the legislature have anticipated that upon the insolvency of American Mutual, the Fund would be required under the Act to advance over $1.5 million in workers' compensation payments on behalf of petitioner. Rather, as noted by the Rhode Island Supreme Court, the Rhode Island Legislature enacted the recoupment provision to "preserve the limited resources of the fund by requiring insureds with a net worth in excess of $50 million to reimburse the fund for all payments made in the course of discharging the insured's liability." *Leviton*, 716 A.2d at 734. Petitioner has not been

unfairly targeted for retribution by the recoupment provision.

Nor does the application of the recoupment provision involve an imposition of a "disproportionate liability" as was the case in *Apfel*. Here petitioner's liability for its employees' work-related injuries was not changed by enactment of the recoupment provision. The Rhode Island Worker's Compensation Act ("RIWCA") provides that employees suffering a personal injury arising out of and in the course of employment shall be paid compensation by their employer. R.I. Gen. Laws § 28-33-1. Thus, the liability for compensating employees for work-related injuries has *always* rested with the petitioner as an employer. Under the RIWCA, petitioner was liable for worker's compensation claims before passage of the recoupment provision and the petitioner remains liable after the enactment of the recoupment provision. What the enactment of the recoupment provision accomplished was to provide that, in the event an insurer were to become insolvent, the Fund would make payments to satisfy the liability obligations insured by any such insolvent insurer and would then have the right to recover those payments from high net worth insureds. *Leviton*, 716 A.2d. at 734-35. The amount the Fund seeks to recover from petitioner under the recoupment provision is not a "tenuous" amount calculated "in a vacuum" as was the case in *Apfel*. 118 S. Ct. at 2150. Rather, the Fund seeks dollar for dollar reimbursement of the payments made by the Fund to petitioner's employees which satisfied petitioner's obligations under the RIWCA. Contrary to petitioner's suggestion, Pet. 11, the amount subject to recoupment from petitioner is not disproportionate or arbitrary. Rather the amount subject to recoupment is precisely equal to the liability of petitioner discharged by the Fund's payments. Unlike *Apfel*, where the liability imposed on Eastern was "unrelated" to any injury it caused, 118 S. Ct. at 2151, petitioner's liability here is precisely equal to the injuries caused to petitioner's employees.

Furthermore, the enactment of the recoupment provision did not "destroy reasonable certainties or securities which are

the very objects of property ownership" as was the case in *Apfel*. As the Rhode Island Supreme Court keenly observed, petitioner could not have reasonably expected that the law pertaining to insurance insolvencies in Rhode Island would always remain frozen as it was when petitioner purchased insurance from American Mutual. *Leviton*, 716 A.2d at 737 (citing *Retired Adjunct Professors* v. *Almond*, 690 A.2d 1342, 1345 (R.I. 1997)) (it is unreasonable to conclude that legislative provisions are "fossilized in legislative amber."). *See Pension Benefit Guar. Corp.*, 467 U.S. at 729, 104 S. Ct. at 2718 ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations"). Petitioner had no legitimate expectation that the 1970 Act would remain frozen in place and provide coverage for all future insurer insolvencies. Further, petitioner has not shown that any past conduct of petitioner was altered by its legitimate expectation that prior law would remain forever unchanged or that petitioner incurred an unforeseen liability as a result of any legitimate reliance on prior law. American Mutual was not insolvent at the time petitioner purchased workers' compensation policies from American Mutual. Petitioner's repeated assertion at pages 16-17 and elsewhere in its petition that petitioner relied on the protections afforded by the 1970 Act when petitioner purchased its workers compensation insurance policies from American Mutual is unsupported by the record. Nor is it reasonable to assume that petitioner consulted the 1970 Act when petitioner obtained its workers' compensation insurance policies from American Mutual. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960) ("many people do not bother to ascertain the niceties of the law in planning their conduct."). The adoption of the Act did not upset any legitimate settled expectations of petitioner.

Petitioner never had a vested property right under the 1970 Act to indemnity from a guaranty fund for workers' compensation claims. *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct.

1441, 1451-52 (1985) (the "well-founded presumption" is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise") (quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937)). The repeal of the 1970 Act and the enactment of the recoupment provision in 1988 leaving petitioner liable for work-related injuries of its employees hardly deprives petitioner of a vested property right in violation of petitioner's right to due process. *Id.*

Finally, the recoupment provision does not place a "severe" liability on petitioner as was the case in *Apfel*. It is not the recoupment provision which renders petitioner liable for workers' compensation benefits which it thought it had insured itself against. Petitioner is liable for the workers' compensation benefits under Rhode Island workers' compensation law that existed at the time of the injuries to petitioner's workers. As noted by the Rhode Island Supreme Court, petitioner is uninsured for such liability not because of the enactment of the recoupment provision but because the insurer from which petitioner elected to purchase insurance became insolvent in 1989 (after the recoupment provision was enacted). *Leviton*, 716 A.2d at 737.

In sum, this is not a case, like *Apfel*, where the legislature targeted a known entity for retribution and imposed a severe, disproportionate and retroactive liability. Petitioner has always been liable for its workers' injuries. The Fund has satisfied petitioner's obligations to petitioner's injured workers by paying those obligations. By such payments, the Fund has directly benefitted petitioner in an amount in excess of $1.5 million. If the Fund had not paid the workers' compensation claims of petitioner's employees, petitioner would have had to pay such claims out of petitioner's own assets. All the recoupment provision does is require petitioner (because it has a net worth in excess of $50 million) to reimburse the Fund for the payments the Fund made on petitioner's behalf. This is not severe, disproportionate or retroactive legislation. In circumstances where an insurer becomes insolvent, Rhode

Island, like twenty-four other states, has simply required insureds with a significant net worth to pay their own workers' compensation obligations instead of shifting such obligations to the Fund and ultimately to the insurance-buying public. The 1988 Act put this mechanism in place only for insolvencies which occur after the enactment of the 1988 Act. This is legislation with a rational public purpose accomplished in a rational manner.

C. *The Rhode Island Supreme Court's Decision Is Not In Conflict With The Decision Of The Oklahoma Supreme Court Relied On By Petitioner.*

The Rhode Island Supreme Court's decision is not in conflict with *State ex rel. John P.Crawford* v. *Guardian Life Ins. Co.*, 954 P.2d 1235 (Okla. 1998). First, the Oklahoma Supreme Court's decision in *Guardian Life* did not decide a constitutional issue. The court's decision in *Guardian Life* was limited to "the narrow issue" of whether the Oklahoma legislature intended the legislation at issue in *Guardian Life* to operate retroactively. *Guardian Life*, 954 P.2d. at 1237-38. The court did "not decide the issue of the constitutionality of applying the statute retroactively because [the court] found that the Legislature did not intend for it to be retroactively applied." *Id.* at n. 2. *Guardian Life* is not in conflict with the Rhode Island Supreme Court's decision because *Guardian Life* did not *decide* an important federal question. Therefore, *Guardian Life* does not present a "compelling reason" for this Court to exercise its discretion under Rule 10.

Moreover, *Guardian Life* presented a different issue than is presented here. *Guardian Life* involved a dispute between a receiver of an insolvent insurer (who is the successor to the insolvent insurer) and a reinsurer, over contractual obligations between the insolvent insurer and the reinsurer. This case, on the other hand, involves petitioner's statutory obligation to reimburse a statutorily created entity which satisfied certain of petitioner's liabilities. As the Rhode Island Supreme Court

correctly observed, "[T]he fund is not a party to the [American Mutual] policies and did not undertake any action to impair Leviton's contract. The fund's responsibilities are statutorily mandated and are not created by or subject to any private agreements." *Leviton*, 716 A.2d at 737. The Fund's rights and obligations arise solely out of the 1988 Act. *Honeywell, Inc.* v. *Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 551 (8th Cir.), *cert. denied*, 118 S. Ct. 156, *reh'g denied*, 118 S. Ct. 592 (1997). The 1988 Act, unlike the legislation at issue in *Guardian Life*, does not impair contractual obligations. *Id. See also* Section II, *infra*.

Finally, *Guardian Life* is not in conflict with the Rhode Island Supreme Court's decision here. In *Guardian Life*, the Oklahoma Supreme Court decided that the legislation at issue in *Guardian Life* operated prospectively to reinsurance contracts executed after the date the legislation went into effect. Similarly, the Rhode Island Supreme Court decided that the recoupment provision of the Act applies prospectively to insolvencies (such as the 1989 insolvency of American Mutual) which occurred after the enactment of the Act in 1988. The Rhode Island Supreme Court's decision is not in conflict with *Guardian Life*.

D. *Even If The Recoupment Provision Were Interpreted As Retroactive Legislation, It Easily Satisfies The Due Process Test For Retroactive Legislation.*

The Rhode Island Supreme Court decided that the recoupment provision does not operate retroactively and therefore found it "unnecessary . . . to analyze [the recoupment provision] further with regard to defendants' due-process rights." *Leviton*, 716 A.2d at 736. Should this Court elect to undertake a complete due process analysis, the petition should be denied because — as determined by the trial court below — the recoupment provision "still meets the minimal test of constitutionality under the Due Process Clause [because] a rational relationship exists between the statute and a legitimate public

purpose." *Rhode Island Insurers' Insolvency Fund*, 1996 WL 936930, at *4.[5]

The 1988 Act is an economic statute. *Leviton*, 716 A.2d at 734. *See also Metropolitan Property & Cas. Ins. Co.* v. *Rhode Island Insurers' Insolvency Fund*, 811 F. Supp. 54, 57 (D.R.I. 1993). Social and economic legislation that do not implicate fundamental rights "enjoy a presumption of constitutionality that casts a heavy burden on the party challenging them 'to establish that the legislature has acted in an arbitrary and irrational way.'" *Turner Elkhorn*, 428 U.S. at 15, 96 S. Ct. at 2892. Retroactive aspects of legislation meet the test of due process if the retroactive application itself is justified by a rational legislative purpose. *Brennan* v. *Kirby*, 529 A.2d 633, 640 (R.I. 1987), citing *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co*, 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

The recoupment provision easily satisfies due process because, assuming *arguendo* that the provision has a retroactive application, such retroactive application is supported by legitimate legislative purposes furthered by rational means. The Act's recoupment provision is intended to deliver benefits to injured parties in immediate need, preserve the Fund's limited resources for legitimate claimants, limit the burden on the persons who purchase the types of insurance covered by the Fund and allocate available Fund resources according to need. *Leviton*, 716 A.2d at 734-35. *See also Attorney General ex rel. Dept. of Natural Resources* v. *Michigan Property & Cas. Guar. Ass'n*, 218 Mich. App. 342, 553 N.W.2d 700 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751 (Mich. 1998); *Oakland County Bd. of Rd. Comm'rs* v. *Michigan Property & Cas. Guar. Ass'n*, 217 Mich. App. 154, 550 N.W.2d 856 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751 (Mich. 1998). All the recoupment provision does is leave ultimate liability for compensation

[5] *See Bennett* v. *Spear*, 520 U.S. 154, 166, 117 S. Ct. 1154, 1163 (1997) (a respondent is entitled to defend the judgment on any grounds supported by the record even if not reached below).

benefits on the employer whose employees were injured. *Leviton*, 716 A.2d at 734-35. The provision does not impose a new liability on petitioner. Even if viewed as retroactive legislation, a provision allowing the Fund to recover from an employer having a $50 million net worth workers' compensation benefits paid by the Fund to satisfy the obligations of such employer to its injured employees is a rational means by which to achieve these legitimate legislative purposes. *Id. See Honeywell, Inc.* v. *Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547 (8th Cir.), *cert. denied*, 118 S. Ct. 156, *reh'g denied*, 118 S. Ct. 592 (1997) (retroactive application of amendment limiting guaranty fund coverage to Minnesota residents did not violate Contract or Due Process Clauses because state had a legitimate interest in regulating the insurance industry, easing the economic burden of its residents and ensuring the economic life of the guaranty association where the general purpose of the statute is to protect the future financial stability of individuals).

The 1988 Act provides Fund protection for insurer insolvencies which occur after the 1988 Act even if the injuries for which the Fund pays compensation occurred prior to the 1988 Act. The recoupment provision accomplishes a legitimate legislative purpose by rational means by allowing the Fund to recover payments from insureds with a $50 million net worth who are liable for such injuries, thereby preserving the Fund's limited resources, limiting the burden on the insurance-buying public, and allocating available Fund resources according to need. *Leviton*, 716 A.2d at 734-35.

In *Turner Elkhorn*, the Court found that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Turner Elkhorn*, 428 U.S. at 18, 96 S. Ct. at 2893. Similarly, the recoupment by the Fund of amounts paid by the Fund to satisfy petitioner's liability for workers' compensation benefits on account of past work related injuries of petitioner's employees is justified as a rational measure to impose

the cost of the employees' injuries on the employer (petitioner) who has profited from the fruits of such employees' labor. *See also United States* v. *Sperry Corp.*, 493 U.S. 52, 65, 110 S. Ct. 387, 396 (1989), *on remand to Sperry Corp.* v. *United States*, 925 F.2d 399 (Fed. Cir.), *cert. denied*, 502 U.S. 809, 112 S. Ct. 53 (1991) ("It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them"); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 647, 113 S. Ct. 2264, 2292 (1993) (imposition of retroactive liability on employers is constitutional where liability is based on employer's conduct) (O'Connor, J. concurring). The recoupment provision is even more narrowly related to the 1988 Act's legitimate purposes than was the statute at issue in *Turner Elkhorn*. While the statute in *Turner Elkhorn* imposed liability where no liability had previously existed, the recoupment provision simply allows the Fund to recover from insureds who are already liable to their employees for work-related injuries where the Fund's payments satisfy that liability. Further, the recoupment provision permits recovery by the Fund only from those companies who have a significant net worth.

In sum, petitioner cannot meet its burden of establishing that the recoupment provision is unconstitutional. Even assuming *arguendo* that petitioner's legitimate settled expectations were upset (which the Fund disputes), and even assuming *arguendo* that petitioner incurred an unforeseen liability in legitimate reliance on prior law (which the Fund disputes) and even assuming *arguendo* that the recoupment provision operates retroactively (which the Fund disputes), the legislation clearly passes constitutional muster because any retroactive aspect is supported by legitimate legislative purposes furthered by rational means. Providing for the prompt payment of workers' compensation benefits to injured workers (even if those injuries arose from accidents pre-dating the Act) and providing for the financial stability of the Fund and the

availability of the Fund for claimants and insureds less able to bear economic loss than insureds with at least $50 million in net worth are legitimate legislative purposes. The recoupment provision is an entirely rational means by which to achieve these legitimate purposes.

II. THE RHODE ISLAND SUPREME COURT CORRECTLY DECIDED THAT THE RECOUPMENT PROVISION OF THE ACT DOES NOT IMPAIR A CONTRACTUAL OBLIGATION IN VIOLATION OF THE CONTRACT CLAUSE.

The Court analyzed the Contract Clause in *Energy Reserves Group, Inc.* v. *Kansas Power & Light*, 459 U.S. 400, 103 S. Ct. 697 (1983) and stated that "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Id.* at 410, citing *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434 (1934). *See also United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21, 97 S. Ct. 1505, 1517, *reh'g denied*, 431 U.S. 975, 97 S. Ct. 2942 (1977) (contract clause prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula).

The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves*, 459 U.S. at 411, 103 S. Ct. at 704, quoting *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978). If there is a substantial impairment, the question becomes whether the State can show a legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. *In re Advisory Opinion to Governor (DEPCO)*, 593 A.2d 943, 949 (R.I. 1991). Finally, once such a purpose has been identified, the court must determine whether the adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the

public purpose justifying the adoption of the legislation. *Energy Reserves*, 459 U.S. at 412, 103 S. Ct. at 705.

With regard to the first inquiry — whether the law operates as a substantial impairment of a contractual relationship — there are three components that must be reviewed: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109 (1992). The Rhode Island Supreme Court properly applied this analytical framework and determined that the recoupment provision did not substantially impair a contractual relationship. Although the Rhode Island Supreme Court did not proceed further with respect to its Contract Clause analysis, it is clear that even if *arguendo* the recoupment provision substantially impairs contractual rights (which the Fund disputes), the recoupment provision is appropriately supported by a legitimate public purpose. Accordingly, the petition should be denied. *Bennett* v. *Spear*, 520 U.S. 154, 166, 117 S. Ct. 1154, 1163 (1997) (a respondent is entitled to defend the judgment on any grounds supported by the record even if not reached below).

A. *The Rhode Island Supreme Court Correctly Decided That The Recoupment Provision Does Not Impair A Contractual Obligation.*

Petitioner argues that the provisions of the 1970 Act set forth the obligations of the insurer, the insured and the Fund in the event of American Mutual's insolvency, and that because petitioner allegedly purchased the American Mutual policies in reliance on the protections afforded by the 1970 Act, any alteration affecting this expectation (including the enactment of the recoupment provision in 1988) results in an unconstitutional impairment of petitioner's contract rights. Pet. 16-17.

The Rhode Island Supreme Court correctly rejected this argument:

> The inherent defect in this argument, however, is the fact that the fund is not a party to the insurance policies and did not undertake any action to impair Leviton's contract. The fund's responsibilities are statutorily mandated and are not created by or subject to any private agreements. It is therefore our opinion that the parties' contractual relationship was impaired by the insolvency of American Mutual in 1989 and its subsequent inability to perform the agreement, not by the enactment of the 1988 recoupment provision.

Leviton, 716 A.2d at 737. The Rhode Island Supreme Court's decision should not be disturbed.

Petitioner's assertions that the Fund "assumed" the contractual obligations of American Mutual under the 1970 Act and that the recoupment provision "nullifie[d] the express terms of the Fund's contractual obligation," Pet. 17, 21 are completely mistaken because the Fund has only statutory obligations. *Id.* The Fund has no contractual relationship with petitioner. The Fund was created in 1988 by the Act. Petitioner does not have any contractual rights against any guaranty association which could possibly be impaired because the rights and obligations of petitioner and the guaranty association are defined solely by statute. *See Honeywell, Inc.*, 110 F.3d at 551.

Furthermore, in deciding that the recoupment provision of the 1988 Act did not substantially impair petitioner's contract with American Mutual, the Rhode Island Supreme Court correctly determined that none of petitioner's reasonable contractual expectations were disrupted by the recoupment provision. *Leviton*, 716 A.2d at 737. Specifically, the court determined that petitioner had no right to assume that the benefits of the 1970 Act would remain forever available for future insolvencies that might occur. *Id.* (citing *Retired Adjunct Professors* v. *Almond*, 690 A.2d 1342, 1345 (R.I. 1997) (parties are not entitled to conclude that legislative provisions are "fossilized in legislative amber").

Petitioner is also incorrect in asserting that the recoupment provision "voided" or "completely vitiat[ed]" petitioner's contracts with American Mutual. Pet. 17. Petitioner's contracts with American Mutual were not disrupted at all by enactment of the recoupment provision. Petitioner was responsible for providing benefits for all work-related employee injuries. R.I. Gen. Laws § 28-33-1. Petitioner chose to insure this workers' compensation risk by entering into a contract with American Mutual. That contract has not been impaired at all by the enactment of the recoupment provision. The Rhode Island Supreme Court correctly observed that petitioner's contract with American Mutual was "impaired by the insolvency of American Mutual in 1989 and its subsequent inability to perform the agreement, not by the enactment of the 1988 recoupment provision." *Leviton*, 716 A.2d at 737.

In sum, the 1988 Act did not affect or impair any contract right of petitioner. Petitioner's contracts with American Mutual stand now as they stood before the 1988 Act. The 1988 Act left petitioner free to pursue whatever contractual claims it had against American Mutual by making a claim with the receiver of American Mutual. It is the deficiency in American Mutual's assets which makes petitioner's contractual rights less valuable, not the enactment of the 1988 Act. *Id.*

B. *Even If The Recoupment Provision Did Substantially Impair Contractual Rights, The Recoupment Provision Appropriately Serves Legitimate Public Purposes.*

Even assuming *arguendo* it were somehow determined that petitioner's contractual rights were substantially impaired by the enactment of the recoupment provision, the recoupment provision is still constitutional if the provision appropriately serves legitimate public purposes. *United States Trust*, 431 U.S. at 22, 97 S. Ct. at 1517. It is beyond question that the recoupment provision was enacted to serve legitimate public purposes. The recoupment provision was designed to ensure payment to injured employees while preserving the Fund's

limited resources. *Leviton*, 716 A.2d at 734-35.

These purposes are plainly sufficient to meet the "legitimate public purpose" standard. *See* Section I.D., *supra*. Indeed, that the recoupment provision meets this standard is confirmed by the fact that at least twenty-four other states have established similar net worth classifications in their respective guaranty fund statutes and that several courts of appeal have upheld the constitutionality of such classifications. *See Bain Peanut Co.* v. *Pinson*, 282 U.S. 499, 501-02, 51 S. Ct. 228, 229 (1931) ("[t]hat the provision in question is reasonable is made more probable by the fact that it had been adopted and sustained not only in Texas but in other States"). *See also Attorney General ex rel. Dept. of Natural Resources* v. *Michigan Property & Cas. Guar. Ass'n*, 218 Mich. App. 342, 553 N.W.2d 700 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751(Mich. 1998); *Oakland County Bd. of Rd. Comm'rs* v. *Michigan Property & Cas. Guar. Ass'n*, 217 Mich. App. 154, 550 N.W.2d 856 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751 (Mich. 1998); *Borman's Inc.* v. *Michigan Property & Cas. Guar. Ass'n*, 925 F.2d 160 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 85 (1992).[6]

If the public purpose test is met, the final question is whether the adjustment of contract rights is reasonable and appropriate to the public purpose. *Energy Reserves*, 459 U.S. at 412-13,103 S. Ct. at 705-06. Here, the Court must defer to legislative judgment. *See United States Trust*, 431 U.S. at 23, 97 S. Ct. at 1518. The test is not whether the recoupment provision was the wisest method which could have been adopted or a perfect method. Rather, the test is merely whether it is a reasonable method.[7] As discussed above, the

[6] Petitioner's citation to *Home Bldg & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 54 S. Ct. 231 (1934) for the proposition that only an emergency situation as dire as the Great Depression could justify the impairment of a contract (Petition p. 21, n.9) is manifestly without merit.

[7] Petitioner's contention at pages 18-19 of its petition that the recoupment provision is unnecessary because the 1988 Act contains a provision, R.I Gen. Laws § 27-34-8(a)(3), whereby the Fund obtains funds through assessments on member insurers, is without merit. The fact that the 1988 Act contains

reasonableness of the recoupment provision is apparent and is confirmed by the fact that numerous other states have enacted similar provisions. The recoupment provision is reasonable and appropriate to its public purposes of providing prompt payment to injured employees, preserving the fiscal integrity of the Fund, lessening the burden on the insurance-buying public and placing the burden on those insureds who are, in any event, liable for such injuries and who are determined by the legislature to be more able to bear the economic loss than insureds with a lesser net worth. *Leviton*, 716 A.2d at 734-35.

Petitioner's assertion that the rational basis test requires an evidentiary showing is incorrect. Pet. 18-19. Economic legislative choices are "not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Communications*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993). *See also Lyng* v. *Castillo*, 477 U.S. 635, 643, 106 S. Ct. 2727, 2732 (1986) (classification upheld based upon what Congress "might have reasoned"). The Rhode Island Supreme Court properly determined that the reasonableness and rationality of the Act are questions of law capable of resolution on the basis of the record before the court. *Leviton*, 716 A.2d at 735 (citing *Power* v. *City of Providence*, 582 A.2d 895, 902 (R.I. 1990)).

In summary, even assuming that petitioner's contractual rights were impaired by the recoupment provision (which the Fund asserts is not the case), the recoupment provision easily passes the contractual impairment test because the recoupment provision serves legitimate public purposes and any adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to such public purposes.

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a funding mechanism does not mean that the recoupment provision does not serve the purpose of preserving Fund resources where the assessments may prove to be inadequate and the separate purpose of limiting the burden on the public which ultimately pays for Fund assessments. R.I. Gen. Laws § 27-34-15.

CONCLUSION

For the foregoing reasons, respondent Rhode Island Insurers' Insolvency Fund respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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Affidavit of James Winskowicz dated April 12, 1996 . A-1

STATE OF RHODE ISLAND

SUPERIOR COURT

PROVIDENCE, SC.

Case No. 93-2505

RHODE ISLAND INSURERS' INSOLVENCY FUND

v.

LEVITON MANUFACTURING COMPANY, INC.

AND

AMERICAN INSULATED WIRE CORPORATION

AFFIDAVIT OF JAMES WINSKOWICZ

I, James Winskowicz, on oath depose and say:

1. I am Vice President — Claims of Guaranty Fund Management Services, an organization that handles claims by and against the plaintiff Rhode Island Insurers' Insolvency Fund (the "Fund").

2. I am submitting this Affidavit in support of plaintiff's motion for partial summary judgment and plaintiffs' dispositive motion to strike constitutional defenses.

3. As Vice President — Claims of Guaranty Fund Management Services, I have responsibility for overseeing claims paid by the Fund and collection of amounts owed to the Fund. I have personal knowledge of the records of the Fund and the manner in which such records are made and kept.

4. The Fund has asserted its right under R.I.G.L. §27-34-11(2)(a) to recoup from at least the following insureds covered claims paid by the Fund on behalf of such respective insureds under policies issued to such insureds by insurers determined to be insolvent: The Roman Catholic Bishop of Providence; Allendale Mutual; Amica Insurance; Cumberland Farms; Brown University; Citizens Bank; National Amusements and Leviton/American Insulated Wire.

5. All of the above listed insureds except the Roman Catholic Bishop of Providence, National Amusements and

Citizens Bank were insured under policies issued by American Mutual Insurance Company.

6. Of the above identified insureds from whom the Fund has sought to recoup payments pursuant to R.I.G.L. §27-34-11(2)(a), only Leviton/American Insulated Wire has refused to repay the Fund. The other seven insureds have reimbursed the Fund pursuant to R.I.G.L. §27-34-11(2)(a).

Signed under the pains and penalties of perjury this 12th day of April, 1996.

s/James Winskowicz
James Winskowicz

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Then personally appeared the above-named James Winskowicz and acknowledged the foregoing to be his free act and deed, before me,

s/Susan G. Pagliuca
Notary Public

My Commission Expires: 2/19/99

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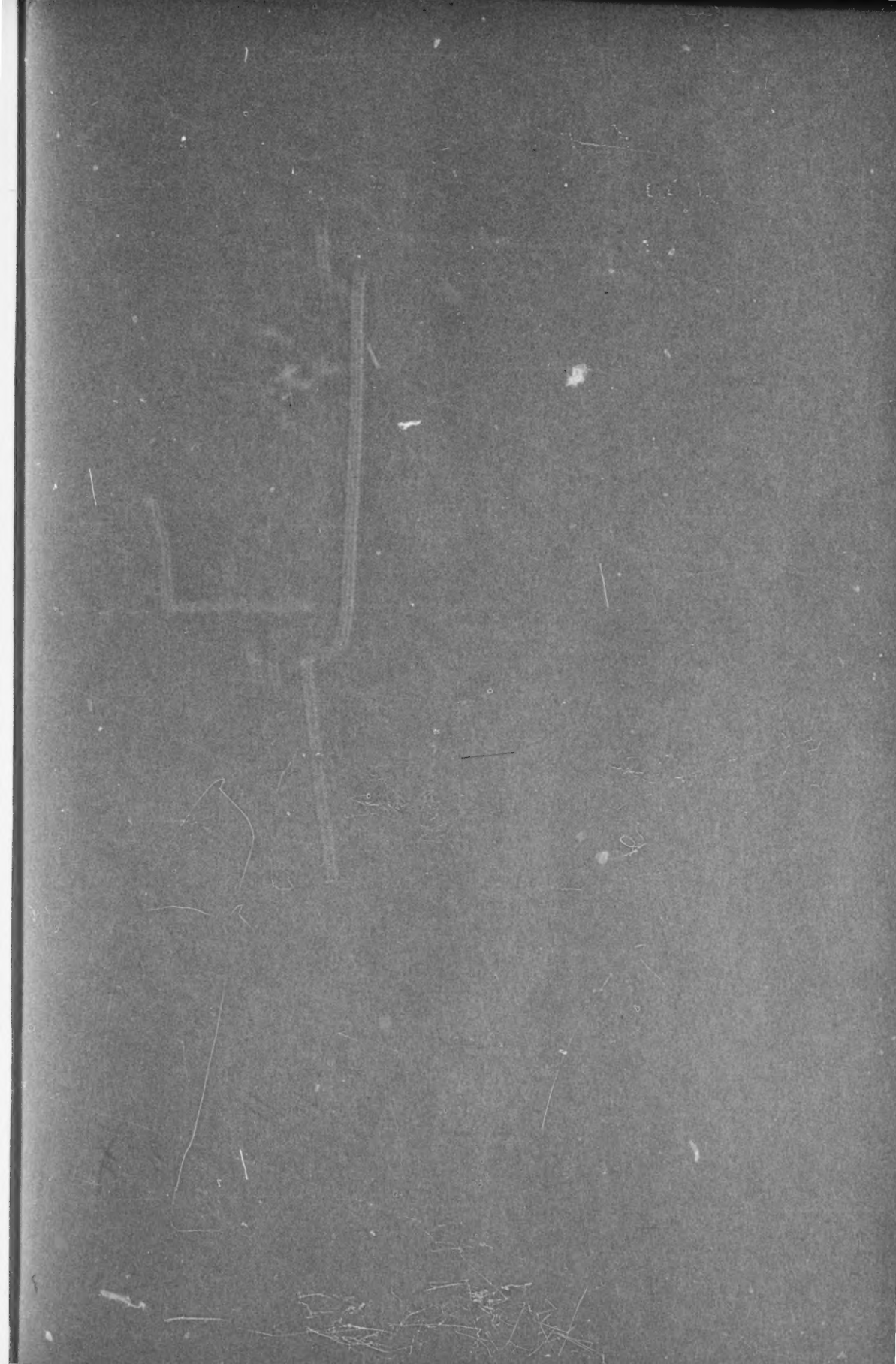

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No. 98 - 669

In The
Supreme Court of the United States
October Term, 1998

LEVITON MANUFACTURING CO., INC.,
Petitioner,
v.
RHODE ISLAND INSURERS' INSOLVENCY FUND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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16pp

QUESTIONS PRESENTED

1. Whether the Rhode Island Supreme Court erred in concluding that the 1988 amendment of Rhode Island Insurers' Insolvency Fund law, which imposed a new duty on Leviton Manufacturing Company, was not retroactive legislation.

2. Whether the retroactive application of the 1988 amendment of the Rhode Island Insurers' Insolvency Fund law to claims that arose in 1983-1986 violates the Due Process Clause.

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No. 98 - 669

In The
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LEVITON MANUFACTURING CO., INC.,
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RHODE ISLAND INSURERS' INSOLVENCY FUND,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977.[1] Its membership consists of corporations, individuals, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system and defending

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1. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882(1996); BMW v. Gore, 517 U.S. 559 (1996); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997); Cigna Health Plan of Louisiana v. Louisiana, 82 F.3d 642 (5th Cir. 1996); Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996); Conservation Law Foundation v. Department of the Air Force, 79 F.3d 1250 (1st Cir. 1996); Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995); Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492 (1st Cir. 1994); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992); International Paper Co. v. Town of Jay, 665 A.2d 998 (Me. 1995); O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686, 664 N.E.2d 743 (1996).

NELF seeks to bring to the Court's attention its views on the importance of the constraints imposed by the Due Process Clause on retroactive economic legislation. Retroactive economic legislation, like the recoupment provision at issue in Leviton's Petition, not only upsets settled expectations but also destroys a company's ability to engage in sound financial planning. As this case demonstrates, it is fundamentally unfair to impose severe financial burdens on businesses after they have, in good faith, complied with and relied on existing law.

Pursuant to Supreme Court Rule 37.2, counsel for *Amicus*, who are employed by the New England Legal Foundation, have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amicus accepts and adopts the Petitioner Leviton Manufacturing Co., Inc.'s Statement of the Case. *See* Leviton Manufacturing Co., Inc.'s Petition for Writ of Certiorari ("Writ") at 2-7.

SUMMARY OF ARGUMENT

The Rhode Island Supreme Court erroneously concluded that the recoupment provision added to the Rhode Island Insurers' Insolvency Fund law in 1988 was not retroactive legislation as applied to claims that arose in 1983-1986 when the Fund was prohibited from seeking reimbursement from any insureds. The retroactive application of the recoupment provision to Leviton's 1983-1986 workers' compensation claims imposes a severe financial burden on Leviton and imposes a new obligation on Leviton that it could not have anticipated when it purchased insurance coverage. The retroactive application of the recoupment provision to Leviton is fundamentally unfair in violation of the Due Process Clause of the United States Constitution.

ARGUMENT

I. THE RHODE ISLAND SUPREME COURT ERRED IN HOLDING THAT THE 1988 AMENDMENT TO THE RHODE ISLAND INSURERS' INSOLVENCY FUND LAW WAS NOT RETROACTIVE LEGISLATION AS APPLIED TO CLAIMS COVERED BY INSURANCE POLICIES PURCHASED BEFORE ITS ENACTMENT.

A. THE HISTORICAL CONTEXT

Leviton Manufacturing Company ("Leviton") bought

workers' compensation insurance from American Mutual Insurance Company ("American Mutual") from April 1, 1983 to April 1, 1986. Claims were made against those policies which American Mutual paid until its insolvency in March, 1989. When Leviton bought the American Mutual policies, the Rhode Island Insurers' Insolvency Fund (the "Fund") was prohibited from seeking reimbursement from any insureds for any covered claims paid on behalf of the insured. Since 1970 through the dates that Leviton purchased the American Mutual policies, Rhode Island law provided that the Fund "shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out." 1970 R. I. Pub. Laws, ch. 166, § 27-34-8-(f).[2] As the Rhode Island Supreme Court has noted, the Rhode Island legislature designed the Fund "to protect both claimants and policyholders from the catastrophic consequences of an insurer's insolvency." Rhode Island Insurers' Insolvency Fund v. Leviton Manufacturing Co., 716 A.2d 730, 732 (1998).

In 1988, before American Mutual was declared insolvent, the Rhode Island legislature repealed the 1970 Act and enacted 1988 R.I. Pub. Laws, ch. 407, § 2 et seq. (codified at R. I. Gen. Laws § 27-34-1 et seq.) (the "1998 Act"). Under the 1988 Act, the Fund was given the right to recover the amount of claims paid on behalf of insureds having a net worth in excess of $50,000,000 "on December 31 of the year next preceding the date the insurer became an insolvent insurer." R.I. Gen. Laws § 27-34-11 (b) (1) (1988). Leviton's net worth exceeded $50,000,000 on the relevant date. In May, 1993, the Fund brought suit against Leviton to recover the amounts it had

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2. In 1988, the Rhode Island legislature repealed the 1970 Act and replaced it with 1988 R.I. Pub. Laws, ch. 407, § 2 et seq., codified at R.I. Gen. Laws § 27-34-1 et seq.

paid to Leviton's workers under the American Mutual policies. In its answer to the complaint, Leviton asserted affirmative defenses challenging the constitutionality of the 1988 Act as applied to insured claims which arose prior to the Act. Among other defenses, Leviton argued that the 1988 Act violates the Due Process Clause by imposing a retroactive obligation on Leviton for workers' compensation claims that arose in 1983-1986 when the Fund was required to step into the shoes of an insolvent insured and was prohibited from seeking recovery from any Rhode Island insureds.

The trial court granted the Fund's motion for partial summary judgment challenging Leviton's affirmative defenses; the Rhode Island Supreme Court affirmed. Rhode Island Insurers' Insolvency Fund v. Leviton Manufacturing Co., 716 A.2d 730 (1998). The Rhode Island Supreme Court held that the 1988 Act was not retroactive because the event that triggered its application was the 1989 insolvency of American Mutual, not the occurrence of liability under the policies purchased years earlier. Id. at 735. By concluding that the 1988 Act was not applied retroactively, the Court found it "unnecessary . . . to analyze § 27-34-11(b)(1) further with regard to defendants' due process rights." Id. at 736. The Court's conclusion that the 1988 Act, as applied to claims which arose under policies purchased prior to its enactment, is not retroactive is incorrect and produces a result that is harsh and oppressive in violation of the Due Process Clause.

B. APPLYING THE 1998 ACT TO LEVITON FOR EVENTS OCCURRING PRIOR TO ITS ENACTMENT IS RETROACTIVE LEGISLATION.

Under this Court's precedent, including the recent decision in Eastern Enterprises v. Apfel, __ U.S. __, 118 S. Ct. 2131 (1998), the 1988 Act, as applied to workers'

compensation claims that arose under the 1983-1986 policies, is retroactive legislation. To determine whether a statute operates retroactively "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994). As this Court has explained:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 270. "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date,'" Miller v. Florida, 482 U.S. 423, 430 (1987), or "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability." Sturges v. Carter, 114 U.S. 511, 519 (1885) (citation omitted). One commentator has explained:

> A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of retroactive statute is one which reaches back to attach new legal rights and duties to already completed transactions. However, a statute may be retrospective even if does not purport to have effect prior to its enactment; this is true, for example, of a statute which declares preexisting obligations unenforceable in the future.

Charles B. Hochman, *The Supreme Court and the*

Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 692 (1960) (footnotes omitted). Under all of these "similar functional conceptions of legislative 'retroactivity,'" Landgraf, 511 U.S. at 269, the 1988 Act, as applied to Leviton in this case, is retroactive legislation.

As noted above, when Leviton purchased workers' compensation insurance in 1983-1986 and when American Mutual incurred liability under those policies, the Fund was prohibited from recovering "against the insured of the insolvent insurer for any sums it has paid out." 1970 R. I. Pub. Laws, ch. 166, § 27-34-8(f). In 1983-1986, there was no reason for Leviton to take additional steps to protect itself and its workers from the prospect of the insolvency of its insurer because the law required the Fund to step into the shoes of an insolvent insurer and pay the claimants without recourse against Leviton.

With the passage of the 1988 Act, a new obligation was placed on Leviton that it did not have before: Leviton became a self-insurer in the event its insurer became insolvent. This unexpected new duty or obligation, of which it had no notice when it purchased the policies in 1983-1986, was imposed not only for future workers' compensation claims, for which Leviton could take steps to protect itself against the possible insolvency of its insurer, but also for past claims against which Leviton could no longer insure. Moreover, the Fund's "preexisting obligation" to step into the shoes of insolvent insurers, on which Leviton and others relied in planning their affairs, was declared "unenforceable in the future." Hochman, supra, 73 Harv. L. Rev. at 692. As applied to Leviton's liability for the workers' compensation claims covered by the 1983-1986 policies, the 1988 Act is retroactive.

II. THE RETROACTIVE APPLICATION OF THE 1988 ACT TO LEVITON VIOLATES THE DUE PROCESS CLAUSE.

All members of this Court agreed in Eastern Enterprises that "[r]etroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history." 118 S. Ct. at 2151 (plurality opinion) (citations omitted). See id. at 2158 (Kennedy, J., concurring) (noting "disfavor of retroactive economic legislation"); id. at 2163 (Breyer, J., dissenting) ("an unfair retroactive assessment of liability upsets settled expectations"). "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal," Kaiser Aluminium & Chemical Corp. v. Bonjorno, 494 U.S. 827, 255 (1990) (Scalia, J., concurring), and "has long been a solid foundation of American law." Id. This Court has noted that

> [r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.

General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992). Moreover, "a person should be able to plan his conduct with reasonable certainty of the legal consequences." Hochman, supra, 73 Harv. L. Rev. at 692. "[T]o the extent that statutory law should serve as a guide to individual conduct, this purpose is thwarted by retroactive enactments." Id. at 693. Accordingly, "retroactive legislation does have to meet a burden not faced by legislation that has only future effects." Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984). "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the

justifications for the latter may not suffice for the former." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976).

While economic legislation comes "to the Court with a presumption of constitutionality," id. at 15, the Court's

> decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Eastern Enterprises, 118 S. Ct. at 2149.

A majority of this Court agreed in Eastern Enterprises that the Due Process Clause affords protection against retroactive legislation. Id. at 2158-59 (Kennedy, J., concurring); id. at 2163-64 (Breyer, J., concurring). Justice Breyer explained:

> To find that the Due Process Clause protects against this kind of fundamental unfairness -- that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retrospective means -- is to read the Clause in light of a basic purpose: the *fair application of law*, which purpose hearkens back to the Magna Carta.

Id. at 2164 (emphasis in original). As summarized by Justice Kennedy, "due process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and irrational way." Id. at 2158. The question is whether "the

law before us is fundamentally unfair or unjust." Id. at 2164 (Breyer, J., dissenting). "The fairness question is, why Eastern?" Id.

The plurality and Justice Kennedy concluded that the Coal Act, as applied to Eastern, was fundamentally unfair.[3] The plurality reasoned that the Coal Act "has forced a considerable financial burden upon Eastern," id. at 2149, estimating that the total payments Eastern would be required to make would be between $50 and 100 million dollars. Id. The plurality reasoned that this burden was not a "responsibilit[y] that Eastern accepted under any benefit plan the company itself adopted." Id. at 2150. In addition, the plurality noted that Eastern had no control over former employees after Eastern left the coal industry in 1965. Id.

The plurality also found that the Coal Act "substantially interferes with Eastern's reasonable investment-backed expectations" by attaching "new legal consequences to [an employment relationship] completed before its enactment." Id. at 2151 (alteration in original). In addition, the plurality concluded that "the nature of the governmental action in this case is quite unusual." Id. at 2153. While acknowledging that "Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits," id., the plurality held that, as to Eastern, that remedy implicated "fundamental fairness":

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3. The dissenting Justices concluded that it was not unfair to apply the Coal Act to Eastern Enterprises "because the relationship between Eastern and the payments demanded by the Act is special enough to pass the Constitution's fundamental fairness test." Id. at 2164.

> When . . . that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness . . . .

Id.

A similar analysis suggests that, as applied retroactively to Leviton's workers' compensation claims that arose in 1983-1986, the 1988 Act is fundamentally unfair. Like the Coal Act, the 1988 Act "singles out certain employers to bear a burden that is substantial in amount." The liability is unrelated to Leviton's conduct because it was created by the 1988 Act and the subsequent insolvency of American Mutual, an event over which Leviton had no control. The 1988 Act also upset Leviton's settled expectations. In 1983-1986, when Leviton purchased workers' compensation insurance from American Mutual, it believed it was protected in the event of its insurer's insolvency because Rhode Island law required the Fund to pay claimants and prohibited the Fund from seeking recoupment from insureds. Accordingly, Leviton did not need to consider whether to take additional steps to protect itself in the event that American Mutual became insolvent. After the 1988 Act was passed and, thereafter, when American Mutual became insolvent in 1989, Leviton was stripped of this protection and became a self-insurer. At that point, Leviton was powerless to protect itself retroactively for the claims that arose years earlier.

Also like the Coal Act, the nature of the governmental action is unusual because the 1988 Act's recoupment provision singles out a small number of companies — those with net worths exceeding $50,000,000 — to lessen the burden on *insurers* who are required by Rhode Island law to contribute to

the Fund through assessments as determined by the Fund. R.I. Gen. Laws § 27-34-9 (1970); R.I. Gen. Laws § 27-34-8 (a) (3). Moreover, the 1988 Act is arbitrary because it does not impose liability retroactively on all insureds based on the benefits they received from the Fund. Rather it singles out those that the legislature apparently believed were in a better position to absorb some of the expenses of the Fund, thus imposing on those few insureds a burden that should properly be borne by all taxpayers, all insureds, or all insurers. It is fundamentally unfair to apply the 1988 Act retroactively to a few companies for claims that arose years before its enactment.

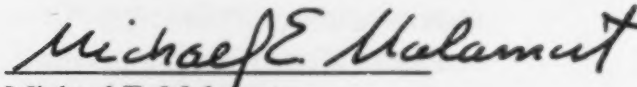
CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

New England Legal Foundation

By its attorneys,



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